

v. 2466

No. 11,568

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION (CIO), et al.,
Appellants,
VS.

CABLE A. WIRTZ, as Judge of the Circuit
Court of the Second Judicial Circuit,
Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,
Appellees.

**Upon Appeal from the Supreme Court of the
Territory of Hawaii.**

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

OPINION BELOW.

The opinion of the Supreme Court of the Territory is reported in 37 Haw. 404. The opinion denying the petition for rehearing is reported in 37 Haw. 445. Both opinions are set forth in full in the Appendix.

JURISDICTION.

This is an appeal from a final decision of the Supreme Court of the Territory of Hawaii in a proceeding for a perpetual writ of prohibition brought by the International Longshoremen's and Warehousemen's Union, CIO, Local 144 of the International Longshoremen's and Warehousemen's Union, CIO, and certain of its officers and members against Cable A. Wirtz, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and the Maui Agricultural Company, Limited. The writ sought was to prohibit the respondents from taking any further action in a certain equity case involving or growing out of a labor dispute in which an ex parte restraining order was issued and contempt process instituted without complying with the terms of the Norris-La-Guardia Act (47 Stat. 70, 29 U.S.C. 101-115).

The Petition for Writ of Prohibition is set forth at page 15 of the Transcript. The Answer and Return of the respondent Wirtz appears at page 45 of the Transcript, and the Return To Order to Show Cause of the respondent Maui Agricultural Company at page 55 of the Transcript.

The jurisdiction of the Supreme Court of the Territory of Hawaii is based on Section 81 of the Organic Act of the Territory (31 Stat. 141, 48 U.S.C. 631) and statutes enacted pursuant thereto. Section 9604 of the Revised Laws of Hawaii 1945 gives the Supreme Court original jurisdiction in questions arising under writs of prohibition directed to circuit courts or to circuit court judges. Sections 10270-10278 of the Re-

vised Laws of Hawaii 1945 define the writ of prohibition and the jurisdiction and power of the court in respect thereto.

The decision of the Supreme Court was made on December 4, 1946 (R. 58-70). Judgment was entered on December 18, 1946 (R. 71-72). The Petition for Rehearing was denied January 23, 1947 (R. 77-79). Plaintiff's petition for appeal to this court was allowed on February 21, 1947 (R. 2-5).

The jurisdiction of this court is based upon the fourth provision of Section 129(a) of the Judicial Code (28 U.S.C. 225), this appeal being from a final decision of the Supreme Court of the Territory involving the construction and application of the Norris-LaGuardia Act, to territorial courts.

STATUTES INVOLVED.

The Norris-LaGuardia Act is printed in full in the Appendix, *infra*.

QUESTION PRESENTED.

Are territorial courts "courts of the United States" as defined by and within the meaning of the Norris-LaGuardia Act, and are the provisions of that Act applicable in the Territory of Hawaii?

STATEMENT OF THE CASE.

This is an appeal from a decision of the Supreme Court of the Territory of Hawaii, holding that territorial courts are not subject to or affected by the provisions of the Norris-LaGuardia Act, and denying a petition for a perpetual writ of prohibition against the Judge of a circuit court who, without complying with the provisions of the Norris-LaGuardia Act, entered an ex parte temporary restraining order against certain types of picketing in a case involving and growing out of a labor dispute.

The Maui Agricultural Company, Limited (respondent below, appellee herein, hereinafter referred to as the respondent company) petitioned the Second Circuit Court of the Territory for an injunction restraining the union representing its employees and certain of its officers and members who were then on strike from certain types of picketing and for an order to show cause why such an injunction should not issue against said union and its members (R. 23-32). On motion of the company (R. 32-35), Cable A. Wirtz as Judge of said court (respondent below, appellee herein, hereinafter referred to as the respondent judge) issued an ex parte temporary restraining order against certain types of picketing by the union, its officers and members (R. 39-42). Contempt proceedings for violations of this ex parte temporary restraining order were instituted in said circuit court.

The union and its officers and members (petitioners below, appellants herein, hereinafter referred to as the union) against whom the ex parte temporary re-

straining order was issued petitioned the Supreme Court of the Territory for a writ of prohibition restraining the respondent judge and the respondent company from taking any further action in, except to dismiss, said proceeding (R. 15-21).

The petition for the writ of prohibition alleged that the petitioners were trade unions, their officers and members; that the respondent judge was the regularly appointed and acting judge of the circuit court of the Second Judicial Circuit of the Territory of Hawaii; that the respondent company had filed in said court a petition for injunction and had applied for and been issued by the respondent judge an ex parte temporary restraining order; that at the time of the filing of said petition for injunctive relief, there was a labor dispute in progress between the respondent company and the union; that the said circuit court is a court of the United States as defined by the Norris-LaGuardia Act; that under the Norris-LaGuardia Act no court of the United States has jurisdiction to issue an injunction or restraining order in a labor dispute without complying with the provisions of that Act; that the petition for injunction showed on its face that the respondent company had not complied with the terms of said Act; that the respondent judge and said circuit court were without jurisdiction to proceed further, or to proceed at all, in said case; that the respondent judge and the respondent company threatened to take further proceedings in said cause.

The union, therefore, prayed the Supreme Court of the Territory of Hawaii for an order against the

respondent judge and the respondent company showing cause why a perpetual writ of prohibition should not be issued prohibiting them from proceeding further in, except to dismiss, said cause, and pending hearing on said order to show cause, the issuance of a temporary writ of prohibition against the respondents.

The Supreme Court thereupon issued a Temporary Writ of Prohibition against the respondents and an order to show cause why a perpetual writ should not be issued (R. 42-44).

The answer and return of the respondent judge (R. 45-55), in so far as here relevant, admitted the existence of a labor dispute and the non-compliance with the Norris-LaGuardia Act but denied that the Norris-LaGuardia Act had any application to a circuit court of the Territory or a circuit court judge sitting in equity or that the terms and conditions of said Act had any bearing on the propriety or validity of the respondent judge's acts in connection with the issuance of the said ex parte temporary restraining order.

The return of the respondent company (R. 55-57) admitted the existence of a labor dispute and that its petition did not comply with all of the provisions of the Norris-LaGuardia Act but denied that the Act limited or in any way affected the jurisdiction of circuit courts of the Territory.

After hearing, the Supreme Court of the Territory, in an opinion by Le Baron, J., held that territorial courts are not courts of the United States as defined

by and within the meaning of the Norris-LaGuardia Act and that the provisions of the Norris-LaGuardia Act are not applicable in the Territory of Hawaii (R. 57-70), and entered judgment dissolving the temporary writ and dismissing the petition for a perpetual writ.

The union filed a petition for re-hearing and re-argument (R. 73-76) which was denied by the court (R. 77-79).

ASSIGNMENTS OF ERROR.

(R. 5-7, 102-3.)

1. The Supreme Court of the Territory of Hawaii, hereinafter referred to as the "Court", erred in making and entering its Opinion and Decision on the 4th day of December, 1946, in the above-entitled court and cause.

2. The Court erred in making and entering its Judgment on the 19th day of December, 1946, in the above-entitled court and cause.

3. The Court erred in making and entering its Opinion and Decision denying the Petition for Re-hearing on the 23rd day of January, 1947, in the above-entitled court and cause.

4. The Court erred in its conclusion that a circuit court of the Territory is not a "court of the United States" as defined by and within the meaning of the Norris-LaGuardia Act.

5. The Court erred in its conclusion that Congress manifested an intention to and did exclude from the coverage of the Act legislative Courts of the United States.

6. The Court erred in failing to give to the Norris-LaGuardia Act the same scope and coverage as the Clayton and Sherman Acts which the Norris-LaGuardia Act amended.

7. The Court erred in failing to construe the Norris-LaGuardia Act as an exercise by Congress of its plenary power to legislate for the Territory of Hawaii.

8. The Court erred in construing the Norris-LaGuardia Act as a narrow procedural act affecting only the jurisdiction of constitutional courts sitting in equity.

9. The Court erred in failing to give effect to the public policy of the United States declared in the Norris-LaGuardia Act.

10. The Court erred in holding that the defendant Cable A. Wirtz as Judge of the Circuit Court of the Second Judicial Circuit had jurisdiction to issue a temporary restraining order in a case growing out of a labor dispute.

11. The Court erred in dissolving the temporary writ in dismissing the petition for writ of prohibition, and in denying a permanent writ of prohibition against the defendants below, appellees here.

SUMMARY OF ARGUMENT.**I.**

Territorial courts, including the circuit courts of the Territory of Hawaii, are subject to the provisions of the Norris-LaGuardia Act because they are courts whose jurisdiction is conferred, defined, and limited by Act of Congress. Section 13(d) of the Norris-LaGuardia Act defines the words "courts of the United States" as used in the Act as "any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia." Territorial courts were created by Congress and their jurisdiction was conferred, defined and limited by Congress, and they are at all times subject to its plenary control.

By the terms of Section 1 of the Norris-LaGuardia Act, Congress conditioned the exercise of jurisdiction of courts subject to the Act in cases involving or growing out of labor disputes on strict compliance with the provisions of the Act. The respondents having admitted the existence of a labor dispute and failure to comply with the provisions of the Act, the respondent as judge of the Second Circuit Court of the Territory was wholly without jurisdiction to proceed.

II.

The legislative definition of the words "courts of the United States" is unambiguous and expressly includes territorial courts. Hence there is no need to

resort to any principles of statutory construction to resolve an ambiguity in meaning or to determine Congressional intent, as the lower court does.

In reaching its conclusion that Congress manifested an intention to exclude legislative courts from the coverage of the Norris-LaGuardia Act, the Court relies on the amendatory effect of the Norris-LaGuardia Act, the title of the Act, the existing judicial distinction between constitutional and legislative courts, the legislative definition and Section 10 of the Act.

An examination of these interdependent premises shows that they do not support the court's conclusion, that they are either erroneous in themselves or furnish no basis for construing Congressional intent.

Thus the Court uses the fact that the Norris-LaGuardia Act amends the Clayton Act, portions of which are incorporated in the Judicial Code, as justifying turning to the Judicial Code to determine the meaning of "court of the United States" as used in and defined by the Norris-LaGuardia Act.

The amendatory effect of the Norris-LaGuardia Act to the Clayton Act is, however, not directed to those sections of the Act that are incorporated in the Judicial Code, as the Court below assumes.

Section 20 of the Clayton Act, which the Norris-LaGuardia Act amends, shows that the very phrase "court of the United States" which the Court is construing is used therein to include both constitutional and legislative Courts.

If Congress had intended the words "courts of the United States" in their technical judicial sense, as the lower court holds, there was no necessity to define the term for the purposes of the Act. By its elaborate series of interdependent premises, which in themselves are erroneous, the court attempts to explain away the controlling legislative definition with the absurd end result that the definition is interpreted as being court of the United States means "court of the United States".

Neither the title of the Act, the legislative definition nor Section 10 of the Act furnish any evidence that Congress intended the words "courts of the United States" to be used in the narrowest possible sense and to exclude legislative courts of the United States.

III.

The Norris-LaGuardia Act must be given the same scope and coverage as the Sherman and Clayton Acts which it amends.

The Sherman Act and the Clayton Act specifically apply to the Territory of Hawaii. Thus under Section 1 of the Clayton Act commerce is defined as commerce between or in and within the Territories of the United States. Under both these acts the Supreme Court has held that Congress exercised its full and plenary power. *United States v. Frankfort Distilleries*, 65 S. Ct. 661; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495. In *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, the Supreme Court held that the power exercised by Congress in the enactment of the pro-

vision of Section 3 of the Sherman Act within the District of Columbia, was its plenary power to legislate for the district. The language used in respect to the District and the Territories in both the Sherman and Clayton Acts is identical. It, therefore, is clear that both these acts apply fully to the Territory and constitute an exercise by Congress of its conceded plenary power to legislate for the Territory.

If the Norris-LaGuardia Act, as an amendatory act, is not given the same scope and geographical effect, the absurd result follows that unamended Clayton and Sherman Acts are in effect in the Territory.

The obligations of enforcement and restraints on jurisdiction under the Sherman and Clayton Acts are placed on the federal district Court for the Territory of Hawaii which is a legislative Court. The Congress cannot, then, have intended to exclude legislative Courts from the scope of the Norris-LaGuardia Act. This being true, there is no basis for excluding Circuit Courts of the Territory from the coverage of the Act.

IV.

The Norris-LaGuardia Act, like the Sherman and Clayton Acts, is an exercise by Congress of its plenary power to legislate for the Territory.

As interpreted by the Supreme Court in the *Hutcheson* case, the Clayton and Norris-LaGuardia Acts

1. exempt labor organizations engaged in labor disputes from the anti-trust acts,

2. drastically limit the power of Courts to issue injunctions in labor disputes,

3. specifically make ~~un~~lawful all the labor union activity defined in the Norris-LaGuardia Act.

Since the power of the territorial legislature is limited to laws not inconsistent with laws of the United States locally applicable, the legislature could not confer, and a Circuit Court does not have, power to enjoin acts specifically made lawful under *all* laws of the United States.

V.

The Norris-LaGuardia Act is not a narrow procedural Act. It confers substantive rights on all persons and organizations in the territories and possessions of the United States for whom Congress can constitutionally legislate.

“The Norris-LaGuardia Act”, the Supreme Court said in the *Hutcheson* case, “reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light Section 20 removes all such allowable conduct from the taint of being ‘*violations of any law of the United States*’, including the Sherman Law”.

These substantive rights accrue to members of labor unions and labor unions in the Territory. Thus in Section 1 of the Clayton Act “person” is defined “wherever used in this act” (which certainly includes section 6 and section 20) as including corporations and

associations of the Territory. Obviously it also applies to natural persons within the Territory.

These substantive rights cannot be held to be violations of any law of the United States, their exercise cannot be made the subject of criminal proceeding and the rights cannot be interfered with by injunctions.

To construe the Act as inapplicable to Circuit Courts of the Territory permits these rights to be drained of all substance in violation of the express provisions of the Act.

VI.

The Norris-LaGuardia Act must be interpreted to effect the declared public policy of the United States.

From the public policy of the Act—as declared by Congress, as interpreted by the Supreme Court of the United States, and as the congressional debates show Congress intended it should be interpreted—it is apparent that Congress intended by the Act to establish a new era of labor relations in the United States in so far as it was within the power of Congress to do so.

The Supreme Court has held, and the congressional debates indicate, that the policy was the law, the procedural provisions were incidental to the accomplishment of the purpose.

The Norris-LaGuardia Act abrogated the common law and judicial decisions written over a period of many years because Congress deemed it in the interest of the general welfare to protect the rights of Ameri-

can workers to organize. Can it be presumed that Congress intended to permit the cancerous condition that gave rise to the Norris-LaGuardia Act to continue to plague the two and one-half million peoples in the territories and possessions of the United States over which Congress has plenary control?

There is no word in the Act that justifies such a construction, and to so construe the Act defeats, nullifies and destroys the intent of Congress as shown in its declaration of policy.

VII.

If the intent of Congress is to be effected, there is only one alternative construction to holding the Norris-LaGuardia Act applicable to a Circuit Court of the Territory. That is to construe the Act as manifesting an intention to confer exclusive jurisdiction, subject to limitations contained in the Act, on the federal District Court for the Territory of Hawaii to issue injunctions in cases involving or growing out of labor disputes.

This construction would fully effect the purposes of the Act and would not be inconsistent with its provisions.

CONCLUSION.

The perpetual writ should have been granted. By virtue of the Norris-LaGuardia Act, the respondent judge was without jurisdiction to proceed either because Circuit Courts of the Territory are Courts as defined in the Act, or because the Act confers substan-

tive rights to engage in the activity restrained in said ex parte temporary restraining order, or because only the federal District Court of the Territory can issue injunctions in cases involving or growing out of labor disputes.

ARGUMENT.

I.

CIRCUIT COURTS OF THE TERRITORY OF HAWAII ARE SUBJECT TO THE PROVISIONS OF THE NORRIS-LaGUARDIA ACT BECAUSE THEY ARE COURTS WHOSE JURISDICTION IS CONFERRED, DEFINED AND LIMITED BY ACT OF CONGRESS.

Assignment of Error No. 4.

The Court erred in its conclusion that a circuit court of the Territory is not a "court of the United States" as defined by and within the meaning of the Norris-LaGuardia Act.

Section 1 of the Norris-LaGuardia Act conditions on strict conformity with the provisions of the Act and the public policy declared therein the existence of jurisdiction of Courts sitting in equity to issue restraining orders and injunctions in cases involving or growing out of labor disputes. It provides (47 Stat. 70, 29 U.S.C. 101):

That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this Act; nor shall any such

restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Congress did not leave to Courts for judicial construction the phrase "court of the United States." It placed its own construction on that phrase. By Section 13 it provided, "*When used in this Act, and for the purposes of this Act,*"

The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

It is well settled that a statutory definition of terms must be given effect to and is controlling on Courts. If the statutory definition varies from the commonly accepted dictionary, technical or judicial definition, the statutory definition supersedes such meanings. 50 Am. Jur. Stat., Sections 254, 262.

Territorial Courts are legislative courts of the United States, subject to the plenary power and control of Congress. The nature of territorial courts is described as follows in *Constitution of the United States*, Revised and Annotated, 1938, p. 547:

Territorial courts are legislative courts created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the

third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States. It is within the competency of Congress either to define directly, by their own act, the jurisdiction of the courts created by them or to delegate the authority requisite for that purpose to the Territorial government; and by either proceeding to permit or to deny the transfer of any legitimate power or jurisdiction previously exercised by the courts of the provisional government to the tribunals of the government they were about to substitute for the Territory in lieu of the temporary or provisional government. The Territorial governments are legislative governments, and their courts legislative courts; Congress, in the exercise of its powers in the organization and government of the Territories, combines the powers of both the Federal and State authorities.

The legislative definition of the term "court of the United States" in Section 13 of the Norris-LaGuardia Act is clear and unambiguous. It embraces any Court which exists by virtue of the authority of the United States and whose jurisdiction has been or may be conferred *or* defined *or* limited by Act of Congress.

Circuit courts of the Territory were created and their jurisdiction both has been and may be conferred, *and* defined *and* limited by Act of Congress. A review of some of the Acts of Congress relating to territorial courts indicates the extent to which Congress has exercised its plenary power over territorial courts.

By its Joint Resolution of July 7, 1898 (Resolution No. 55 of July 7, 1898, 30 Stat. 750), annexing the Hawaiian Islands to the United States, Congress accepted the cession to the United States by the Government of the Republic of Hawaii of "all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies".

In the period between July 7, 1898, and the enactment by Congress of the Organic Act of April 30, 1900, Congress exercised the sovereignty ceded to it by delegating to the existing officers of the Republic of Hawaii—civil, judicial and military—the government of the Islands, subject to direction by the President of the United States. The Joint Resolution provided:

Until Congress shall provide for the government of such Islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct * * *

In this period between the adoption of the Organic Act and the Resolution of Annexation the courts of the Territory were courts of the United States exercising power by virtue of delegation of authority by Congress.

With the adoption of the Organic Act (Act of April 30, 1900, 31 Stat. 141), Congress conferred jurisdiction to exercise the judicial power of the Territory on the Supreme Court, circuit courts and

in such inferior courts as the legislature might establish. Section 81 of the Organic Act (48 U.S.C. 631) provided:

That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the civil courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided.

Section 83 of the Organic Act, 48 U.S.C.A. 635, continued the laws of Hawaii relative to the Judicial Department, including civil and criminal procedures, except as amended by the Organic Act itself, and *subject to modification by Congress or the Legislature.*

Under no construction of the language of Section 81-83 of the Organic Act can any conclusion be reached other than that the Congress of the United States conferred jurisdiction on the Supreme and circuit courts of the Territory of Hawaii.

Nor did Congress stop with the conferring of jurisdiction. It defined and limited the general grant of jurisdiction to the Supreme and circuit courts of the Territory in several respects.

By Section 5 of the Organic Act, 48 U.S.C.A. 495, Congress limited the power of the Legislature, as well as of the courts, by providing that the Constitution of the United States and *all laws of the United*

States not locally inapplicable should have the same force and effect within the Territory as elsewhere in the United States.

By Section 6 of the Organic Act, 48 U.S.C.A. 496, Congress continued in force only those laws of the Republic of Hawaii not inconsistent with the Constitution or laws of the United States or the Organic Act, and made these laws which were continued subject to repeal or amendment by it or by the Legislature of Hawaii.

By Section 55 of the Organic Act, 48 U.S.C.A. 519, 562, Congress placed residence limitations on the jurisdiction of the courts of the Territory—as well as the power of the legislature—to grant divorces.

By Section 80 of the Organic Act, 48 U.S.C.A. 546, 633, Congress empowered the President of the United States to nominate, by and with the advice and consent of the Senate, the Chief Justice and Justices of the Supreme Court and the judges of circuit courts. Congress likewise provided for the term of office of circuit court judges and provided that their salary should not be diminished during their term of office.

By Section 83 of the Organic Act, 48 U.S.C.A. 635, Congress empowered circuit court judges to determine the times at which grand juries shall sit and to subpoena witnesses to appear before the grand jury.

By Section 84 of the Organic Act, 48 U.S.C.A. 636, Congress prohibited judges of the Territory (which includes circuit judges) from sitting in cases in

which a judge or his relatives were pecuniarily or otherwise interested, and delegated to the Legislature the power to add other causes of disqualification.

By Section 86 of the Organic Act, 48 U.S.C.A. 641-645, Congress granted to the Federal District Court of Hawaii the jurisdiction of District Courts of the United States. In effect this divested the circuit and Supreme Courts of the Territory of jurisdiction previously exercised by them after the Resolution of Annexation, as for example jurisdiction in admiralty. *Carter v. Second Judge*, 16 Haw. 242, 255.

By Section 92 of the Organic Act, 48 U.S.C.A. 536, 539, 634, Congress fixed the annual salary of circuit court judges of the Territory of Hawaii and provided that they should be paid by the United States.

It is clear from these provisions of the Organic Act that from the outset circuit courts of the Territory were created, their jurisdiction was conferred, and their powers were defined and limited by Act of Congress.

Nor are the provisions of the Organic Act and the amendments thereto from time to time the only instance in which Congress has conferred or defined the jurisdiction of circuit courts of the Territory. For example, on July 10, 1937, and November 26, 1941, by Section 703 of the Hawaiian Homes Commission Act (48 U.S.C. 691-718), Congress conferred jurisdiction to approve guardians on the "court of proper jurisdiction". By Section 711 Congress empowered the Commission to

(1) bring action of ejectment or other appropriate proceedings or (2) invoke the aid of the *circuit court of the Territory* for the judicial circuit in which the tract designated in the commission's order is situated. Such court may thereupon order the lessee or his successor to comply with the order of the commission. Any failure to obey the order of the court may be punished by it as contempt thereof.

Congress also repealed all laws of the Territory inconsistent with the Hawaiian Homes Commission Act.

It is thus clear that not only does Congress possess plenary power over territorial Courts, but that it has exercised this power over Circuit Courts of the Territory and has conferred, defined and limited their jurisdiction. Circuit Courts fall squarely within the phrase of "court of the United States" when used in and for the purpose of the Norris-LaGuardia Act. Thus they have no jurisdiction to issue restraining orders or injunctions in cases involving or growing out of labor disputes without complying with the provisions of the Act. The respondents admitted the existence of a labor dispute and their failure to comply with the provisions of the Act. The Supreme Court of the Territory was therefore required by law to issue a perpetual writ prohibiting the respondents from proceeding in the equity action complained of since the Court was without jurisdiction.

II.

CONGRESS MANIFESTED NO INTENT TO EXCLUDE LEGISLATIVE COURTS FROM THE COVERAGE OF THE ACT.**Assignment of Error No. 5.**

The Court erred in its conclusion that Congress manifested an intention to and did exclude from the coverage of the Act legislative Courts of the United States.

For the reasons set forth under Point I, we find no ambiguity in the legislative definition of Courts contained in the Norris-LaGuardia Act necessitating or justifying resort to extraneous manifestations of Congressional intent. But the Court below assumes from the outset that the Congressional definition of Court contained in the Act is ambiguous and looks elsewhere to find the Congressional intent.

Briefly, the Court's theory that Congress manifested an intention to and did exclude legislative Courts from the coverage of the Act is developed as follows: The Court first determines that the Norris-LaGuardia Act is amendatory of the Clayton Act and professes by its title to be an amendment to the Judicial Code which "significantly contains portions of the Clayton Act". The Court then uses the reference in the Title to the Judicial Code and the presence of portions of the Clayton Act in the Code to justify turning to the history of the federal judiciary and to the Judicial Code to determine the meaning of "court of the United States" as used in the Norris-LaGuardia Act. It finds a judicial distinction has been made between Courts established under Article III of the Constitution

which are termed constitutional Courts and Courts established under Article IV of the Constitution which are called legislative Courts. It further finds that the Judicial Code deals "primarily" with constitutional Courts, and refers to them as "courts of the United States". The Court therefore deduces the intention of Congress to use "court of the United States" in the Norris-LaGuardia Act to mean only Courts established under Article III of the Constitution. The Court then turns to the Act and finds corroborative evidence of this intention in the legislative definition and in Section 10 of the Act.

None of the premises relied on by the Court supports its conclusion that Congress manifested an intention to exclude legislative Courts from the coverage of the Act. We shall discuss *seriatim* each premise relied on by the Court to deduce this intent.

A. THE NORRIS-LA GUARDIA ACT AS AN AMENDMENT TO THE CLAYTON ACT.

That the Norris-LaGuardia Act effects amendments in the Clayton Act is clear, as the Court below point out, from *United States v. Hutcheson*, 312 U.S. 219, 85 L. ed 788. But it is almost inconceivable that the Court below could use this fact as a link in a chain of logic supporting the narrowest possible construction of the Norris-LaGuardia Act—that is, its application to only one class of courts for which Congress can legislate. The Supreme Court in the *Hutcheson* case shows that it is the very interrelation between the two Acts that wrought a revolution in

labor's rights and overthrew a quarter of a century of Supreme Court decisions affecting labor.

The very language the lower court quotes from the *Hutcheson* case to show the amendatory effect implies the sweeping effect and broad scope of the Norris-LaGuardia Act:

The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction.

When this language is put back into context in the paragraph from which it is quoted, the Supreme Court's rejection of a narrow construction of the Act becomes startlingly clear. The Supreme Court prefaces the statement with a rejection of a technical construction of the Act:

The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision.

After stating the underlying aim of the Act, the Court continues:

This was authoritatively stated by the House Committee of the Judiciary. "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act * * * which Act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." * * * The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press*

Co. v. Deering * * * and *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association* * * * as the authoritative interpretation of Section 20 of the Clayton Act, for Congress now placed its own meaning on that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light section 20 removes all such allowable conduct from the taint of being "violations of any law of the United States", including the Sherman Law.

If the fact that the Norris-LaGuardia Act is amendatory of the Clayton Act is to be used to assist in resolving any ambiguity in Congressional intent in respect to the scope and coverage of the Act, surely the construction arrived at must at least give the amendatory Act the same scope and coverage as the Act which it amends.

By Section 1 of the Clayton Act (38 Stat. 730, 29 U.S.C. 53) the word "person" or "persons" wherever used in the Act—and this certainly includes Section 20 to which the Norris-LaGuardia Act relates—is defined as including "corporations and associations existing under or authorized by the laws of either the United States," or "the laws of any of the Territories". "Commerce" is defined to include trade and commerce between the Territories, the District of Columbia and any State, and trade and commerce within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States."

“Court of the United States” as used in Section 20 of the Clayton Act includes *both constitutional Courts and legislative Courts of the territories and possessions of the United States, as will be clearly shown under Point III.*

In the Clayton Act, including Section 20, Congress exercised its plenary power to legislate for the Territory of Hawaii. By all settled rules of construction and logic the amendatory act must likewise be considered an exercise of Congress’ power to legislate for the Territory.

B. THE TITLE OF THE ACT.

From its determination that the Norris-LaGuardia Act is amendatory of the Clayton Act, the Court turns for further manifestation of Congressional intent to the title of the Act, saying:

Consistent therewith, the Norris-LaGuardia Act by its caption “An Act to Amend the Judicial Code * * *” professes to be an emendation of that Code which significantly contains portions of the Clayton Act.

The Court sets forth only a portion of the title. Chapter 90 of the first Session of the 72nd Congress on March 23, 1932 (47 Stat. 70), shows that the full title of the Norris-LaGuardia Act is:

An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes.

What is the effect of the Title of an Act of Congress? And what weight should be given to it in

determining Congressional intent? Unlike some state constitutions, there is no requirement under the Constitution of the United States that acts shall have identifying captions or titles. Neither is there any restriction in the Constitution limiting Congress to one subject of legislation in each bill, such as is found in many state constitutions. Congress may enact several separate subjects in one bill. See *Chase Nat. Bank v. Mobile & O. R. Co.*, 30 F. Supp. 565.

The Supreme Court of the United States early decided that the titles of Congressional Acts furnish little aid in the construction of Congressional enactments. See, for example, *United States v. Union Pacific R. R. Co.*, 91 U. S. 72, 82, where the Court said:

It has been observed by this Court, that the title *of an Act, especially in Congressional legislation*, furnishes little aid in the construction of it, because the body of the Act in so many cases, has no reference to the matter specified in the title. *Hadden v. The Collector*, 5 Wall. 110. (Italics ours.)

Congress in framing and passing the Norris-La-Guardia Act enumerated two specific purposes in its caption, first an intent to amend the Judicial Code, second an intent to define and limit the jurisdiction of courts sitting in equity, and third an intent to accomplish other unspecified purposes. The Court ignores two provisions of the title and gives weight only to one provision. Thus the Court's construction of the title of this Act as an indication of an intent

to amend the Judicial Code only or primarily clearly violates and nullifies any legislative intent discernible from the title.

Because a portion of the title of the Act professes to amend the Judicial Code, the Court finds significance in the fact that portions of the Clayton Act are set forth in that Code. It relies on this fact to justify turning to the history of the federal judiciary and the Judicial Code to determine the meaning of "Court of the United States" as used in the Norris-LaGuardia Act. The Court says:

The portions of the Clayton Act (Oct. 15, 1914, c. 323, secs. 17-19, 21-25, 38 Stat. 737-740) incorporated into the Judicial Code at the time the Norris-LaGuardia Act was enacted all appear in chapter ten of the Judicial Code, constituting sections 381 to 383 and 386 to 390, inclusive, of the United States Code and all relate in subject matter to the Norris-LaGuardia Act.

But the Supreme Court in the *Hutcheson* case, *supra*, said that the Norris-LaGuardia Act amended Section 20 of the Clayton Act which deals with the rights of labor and is set forth in the labor code. What significance can properly be attached to the fact that irrelevant sections of the Clayton Act are incorporated in the Judicial Code?

But even the sections of the Clayton Act incorporated in the Judicial Code do not support the thesis of the court. Section 21 of the Clayton Act refers to "any district court of the United States, or any court of the District of Columbia". Since the Clay-

ton Act is an exercise of Congress' plenary power to legislate for the Territory, the phrase "district court of the United States" clearly covers the Federal District Court for the Territory of Hawaii which like a circuit court is a legislative court.

Neither the fact that the Act by its title professes to amend the Judicial Code nor the fact that some sections of the Clayton Act are incorporated in the Judicial Code in themselves indicate any intent to exclude legislative courts of the United States from its coverage, or justify turning to the Judicial Code to determine the meaning of "Court of the United States" as used in the Norris-LaGuardia Act.

C. THE JUDICIAL DISTINCTION BETWEEN CONSTITUTIONAL AND LEGISLATIVE COURTS.

Relying on its premise that the Norris-LaGuardia Act amends the Judicial Code, the Court turns to the history of the federal judiciary and the judicial code to determine the meaning of "Court of the United States". It finds a well recognized judicial distinction between courts established under Article III of the Constitution which are termed constitutional courts, and courts established under Article IV of the Constitution which are termed legislative courts. It concludes that the Judicial Code deals "primarily" with constitutional courts and refers to them as "Courts of the United States". The Court then asks:

In professing to amend the Judicial Code and in restoring the contemplated purpose of the Clayton Act, did Congress intend to go beyond the federal judicial system affected thereby and dis-

turb the meaning, established therein, of the phrases "courts of the United States" and "any court of the United States" in so far as it is limited to constitutional courts under Article III.

The Court answers the question in the negative.

But let us see what exigencies and what necessities gave rise to the distinction between legislative and constitutional courts.

In *Page v. Burnstine*, 102 U. S. 664, the Supreme Court held that a Congressional statute creating an exception to a general statutory rule of evidence was effective in the District of Columbia by virtue of the Congressional declaration that all laws of the United States not locally inapplicable should have the same force in the District as elsewhere within the United States. (Note that Section 5 of the Organic Act, 48 U.S.C. 495 contains the same provision.) The Supreme Court said:

The same considerations of public policy which would require the enforcement of such a statute * * * in the Circuit and District Courts of the United States * * * would suggest its application in the administration of justice in the courts of the district.

The Court very interestingly goes on to explain the effect of its decisions in *Clinton v. Englebrecht*, 13 Wall. 434, *Hornbuckle v. Toombs*, 18 Wall. 648, and *Good v. Martin*, 95 U. S. 90, which held that territorial Courts were not "Courts of the United States" as those words were used in the statutes being construed in those cases, saying:

These views do not at all conflict with the previous decisions of this court, holding that *certain provisions of the General Statutes of the United States relating to the practice and proceedings in the "courts of the United States"* are locally inapplicable to territorial courts. Those decisions, it will be seen, proceeded upon the ground, mainly, that the legislatures of the Territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the General Statutes of the United States referred. It was, therefore, ruled that the territorial enactments, regulating the practice and proceedings of territorial courts, were not displaced or superseded by *general statutes* upon the same subjects passed by Congress in reference to "courts of the United States." *Clinton v. Englebrecht*, 13 Wall. 434, *Hornbuckle*, 18 id. 648, *Good v. Martin*, 95 U. S. 90. No such state of case exists here. The reasons assigned for the conclusion reached in those cases have no application to the question before us.

There is no statute in the Territory relating to the jurisdiction of Circuit Courts sitting in equity in cases involving or growing out of labor disputes. If, prior to the passage of the Act, Circuit Courts of the Territory had any power to issue injunctions in labor disputes, such power existed only by virtue of Section 81 of the Organic Act, 48 U.S.C. 631, and Sections 12401 and 12402 conferring a general power of equity on Circuit Courts. There is no conflict between a territorial act regulating the issuance of

injunctions in labor disputes and the Norris-LaGuardia Act. Hence, clearly within the rule laid down in the *Page* case no local law is being displaced or superseded.

The Norris-LaGuardia Act is not a general law, but a law dealing with a special subject—the rights of labor. Clearly Congress has the power to create exceptions to general laws of the Territory.

As we have seen, the Supreme Court in the *Page* case construed a provision identical to the provision in our Organic Act that all laws of the United States not locally inapplicable are in force in the Territory, as actually importing into the local laws all exceptions to general laws contained in Acts of Congress where it appears that the requirement of public policy which motivated the enactment apply with equal force in the Territory. That this is the case with the declared policy of the Norris-LaGuardia Act cannot be denied.

The Court cites *McAllister v. United States*, 141 U. S. 174 and *Mookini v. United States*, 303 U.S. 20 to support its conclusion that Congress manifested an *intent* to exclude territorial Courts from the scope of the Act because it used the words “Courts of the United States”. Thus the Court below says:

It is reasonable to assume that Congress used the two phrases, “courts of the United States” and “any court of the United States” coextensively with the scope of the Act with respect to the courts affected thereby and advisedly in the historical meaning of constitutional courts, con-

tradistinguished from legislative courts, which those phrases have concededly acquired by legislative use and judicial interpretation. (See *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693; *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356; *Mookini v. United States*, 303 U. S. 201, 82 L. ed. 748.) Further, Congress is presumed to have been aware of and have intended to adopt such meaning, especially when it employs in the existing and related Judicial Code the same phrases of identical import to denote courts vested with the judicial Power of the United States by Article III of the Constitution.

The *O'Donoghue* case will be discussed below. The *Mookini* case, decided in 1938, clearly cannot be used as evidence of Congressional intent held in 1932 when the Act was passed. Congress surely cannot be presumed in sooth-saying fashion to have looked into the future to determine the pitfalls of judicial decisions of which it must beware in framing the language of the Norris-LaGuardia Act to express its intent. The *McAllister* case simply holds that a person appointed a judge of the Federal District Court of Alaska is not a judge of a "Court of the United States" within the meaning of an exception to a Congressional statute dealing with the tenure of civil officers. The President of the United States had removed Judge McAllister prior to the end of his term. The exception contained in the statute exempted judges of courts of the United States from the tenure of office act. The Court said the Federal

District Court for Alaska was not a Court of the United States as used in the exception because the Federal Court for Alaska, being a legislative Court of the United States, was not subject to the restrictions on life tenure of judges of inferior Federal Courts contained in Article III of the Constitution. The decision in the *McAllister* case cites and relies upon *Clinton v. Englebrecht*, *Hornbuckle v. Toombs*, and *Good v. Martin* and the same reason that impelled the Supreme Court in the *Page* case to distinguish them applies equally to the *McAllister* case.

These Supreme Court decisions holding territorial Courts not Courts of the United States for the purposes of particular statutes have all relied upon and discussed the inferior status of territorial Courts in comparison with constitutional Courts, and Congress' plenary power over them.

The Court below novelly used this distinction for the purpose of elevating legislative Courts of the United States above constitutional Courts by endowing the legislative Courts with unrestricted discretion in the issuance of labor injunctions—a discretion which no constitutional Court can exercise because of the Clayton and Norris-LaGuardia Acts.

The circumstances under which Courts have drawn distinctions between constitutional and legislative Courts differ materially from and have no application, properly interpreted, to the facts presented to this Court. The reason which motivated these decisions—the intent of Congress manifested in the stat-

ute being construed—in this case compel a different conclusion. Here Congress has manifested an intent to establish a uniform public policy on the issuance of labor injunctions by courts subject to its control.

Although there is a well recognized distinction between constitutional Courts of the United States and legislative Courts of the United States, Congress, Courts and legal historians have not, as the lower Court would have us believe, universally excluded territorial Courts from the phrase “Courts of the United States.”

The Court in *United States v. Haskins*, 26 Fed. Cas. 213, sets forth a good common sense rule, relying on two Supreme Court cases, the *Englebrecht* case, *supra*, and *Hunt v. Palao*, 4 How. 589. Holding that territorial Courts are “Courts of the United States” as that designation is applied in section 33 of the Judiciary Act, the Court said:

The question for determination is, whether the provisions of the thirty-third section of the judiciary act, touching the arrest and removal of offenders against the United States, must be limited in their operation to cases arising in those districts which embrace a state or some portion thereof * * *

It is doubtless true that the provisions of the judiciary act are, for the most part, confined in their application to courts of the United States in the sense of the constitution. * * * Now the provisions of Section 33 are of universal application, and are plainly intended to cover every

offense against the United States, committed within the jurisdiction of any of its Courts.

While the district Courts of Utah are neither state Courts nor United States Courts in the sense of the constitution, they are still Courts established and organized under the authority of the United States and exercising their jurisdiction conferred upon them by that government. The whole territory is under the plenary control of the general government, and the districts, while they are territorial districts, are still districts within which certain offenses against the United States must be tried if tried at all.

It appears to me that, although the district Courts of Utah are not Courts of the United States, as defined in *Clinton v. Englebrecht*, they are in another sense not improperly styled Courts of the United States as being organized by that government under the authority to make needful regulations for the territories. They are spoken of as such in acts of Congress and in opinions of the Supreme Court. Thus in *Hunt v. Palao*, 4 How. (45 U. S.) 589, the territorial Court of Florida is spoken of as a court of the United States in contradistinction to a state court, and in *Clinton v. Englebrecht* the court speaks of these courts as acting, in cases arising under the constitution and laws of the United States, "as circuit and district courts of the United States". So far, then, as these courts have exclusive jurisdiction over crimes committed against the United States they may, it seems to me, be held to be included in the term "courts of the United States" as used in the thirty-third section of the

judiciary act. I cannot see that any sound rule of construction is violated by so doing. The act is remedial in its character, and I do not find any good ground for giving it so narrow and technical a construction as is contended for by the defendant, the practical effect of which must be to leave offenses committed in a territory where they cannot be reached or punished if the offender succeeds in escaping to some state.

Legislative Courts are Courts of the United States in the sense that they were created by Congress under authority of the Constitution. This is true whether the particular legislative court in question is the United States Court of Claims or a Territorial Court. This is uniformly recognized by all legal digesting systems. Thus 20 Federal Digest 255, Title VII, *under* Courts, is set up like this:

VII. United States Courts

G. Supreme Court

H. Circuit Courts of Appeals

I. Circuit Courts

J. District Courts

K. Territorial and Provisional Courts

L. Courts of District of Columbia

M. Courts of Claims

As we have seen, "District Court of the United States" as used in the Clayton Act and the very phrase here construed "Court of the United States" includes the Federal District Court of the Territory which is a legislative Court.

Territorial Courts are "Courts of the United States" as that term is used in the Seventh Amendment to the Constitution. See United States Constitution, Revised and Annotated, where it is said, at page 693:

To What Courts Applicable.

This amendment applies only to courts sitting under the authority of the United States, including courts in the Territories and the District of Columbia. It does not apply to a State court even where it is enforcing a right created by Federal statute; the court in such case still derives its authority as a court from the State.

Territorial Courts are "federal" Courts. "Federal Legislative Courts", 43 Harv. L. Rev. 894.

If, as the Court below contends, the meaning of "court of the United States" is by judicial definition clearly and irrevocably Courts established under Article III of the Constitution, and if Congress had intended that past judicial interpretation to control, Congress need not have defined the term in the Norris-LaGuardia Act.

D. THE LEGISLATIVE DEFINITION.

The Court below finds that "a bare reading of Section 113(d) of the Norris-LaGuardia Act" shows that "in professing to amend the Judicial Code and in restoring the contemplated purpose of the Clayton Act," Congress did not intend "to go beyond the federal judicial system affected thereby and disturb the meaning established therein, of the phrases 'courts

of the United States' and 'any court of the United States' in so far as it is limited to constitutional courts under Article III''.

Section 13(d) of the Norris-LaGuardia Act provides:

When used in this Act, and for the purposes of this Act, * * * The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

The Court construes this Congressional definition as accomplishing two purposes—excluding the Supreme Court of the United States and including the Courts of the District of Columbia. The Court says:

In restricting the definitive phrase "any court of the United States" by the clause "whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia," the section accomplishes two primary objectives. Both pertain to courts of the United States. One is to eliminate for the purposes of the Act the Supreme Court, whose appellate and original jurisdiction stems from the Constitution, from the Act's scope and the other to make certain that the courts of the District of Columbia, whose jurisdiction is controlled by Congress, come within it. However, there is no language contained in the section which can be reasonably interpreted or judicially construed as evincing an intention to read into the phrases "courts of the United States" and "any court of the United

States'' a status of court different from that dealt with by the related Judicial Code or destroy the identical meaning existing therein between courts of the United States and constitutional courts under Article III of the Constitution.

The Court attempts to explain away the clear and unambiguous meaning of the legislative definition by relying on the repetition of the words "court of the United States''. As the Court interprets the definition it reads: Court of the United States means "court of the United States''. The Court ignores the addition of the phrase "whose jurisdiction has been or may be conferred or defined or limited by Act of Congress''.

Although the *Mookini* case, *supra*, affords no help in the determination of legislative *intent*, because it was decided after the passage of the Act, the Supreme Court there lays down a relevant rule of construction. That case determined that the term "District Court of the United States'', as used in the Criminal Appeals rules, did not include the territorial District Court. There was direct evidence that the Supreme Court had drawn these rules with the intention of excluding Territorial District Courts, as its statutory authority to prescribe rules permitted it to do. But the Court carefully restricted its holding saying:

The term "District Courts of the United States'', as used in the rules, *without an addition expressing a wider connotation*, has its historic significance.

It is difficult to see how Congress could have more clearly expressed its intention to give the widest possible scope to the phrase "courts of the United States" than by adding the clause "whose jurisdiction has been or may be conferred, or defined or limited by Act of Congress."

1. The definition as manifesting an intention to exclude the Supreme Court of the United States.

As we have seen, the Court concludes that Congress framed its legislative definition of "court of the United States" partly for the purpose of excluding the Supreme Court from the scope of the Act. Thus the Court says, "In restricting the definitive phrase 'any court of the United States' by the clause 'whose jurisdiction has been or may be conferred or defined or limited by Act of Congress * * *' the section accomplishes two primary objectives. Both pertain to Courts of the United States. One is to eliminate for the purposes of the Act the Supreme Court, whose appellate and original jurisdiction stems from the Constitution."

It is true that the Constitution confers original jurisdiction on the United States Supreme Court in cases affecting Ambassadors, Public Ministers and Consuls, and in which States are parties. But the Constitution itself confers on Congress the duty and authority to define the appellate jurisdiction of the Court.

Thus the Supreme Court in *United States v. Klein*, 80 U. S. 128, 147, recognizes the power of Congress to define its appellate jurisdiction:

The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

It seems to be an open question as to whether Congress can enlarge the original jurisdiction of the Supreme Court. Thus in *Ex parte Bakelite*, 279 U. S. 483, 73 L. ed. 789, the Court said:

The power of this Court to issue writs of prohibition has never been clearly *defined* by statute or by decisions.

From the foregoing it is clear that the definition of court of the United States contained in the Norris-LaGuardia Act does not *per se* exclude the Supreme Court. It is a Court of the United States, and Congress has power to define its jurisdiction. This brings it within the scope of the definition. Thus if the purpose of Congress in framing the definition was to exclude the Supreme Court, it failed to accomplish it.

The Act does not, in fact, affect the original jurisdiction of the Supreme Court to issue injunctions because it exercises no original jurisdiction in equity. This being true, the Court is attributing to Congress

an absurd Act, and the Court's presumption of a Congressional intent to exclude the Supreme Court in framing the definition of the Norris-LaGuardia Act is clearly erroneous.

2. **The definition as manifesting an intention to make certain that the Courts of the District of Columbia come within the definition.**

The Court construes the words, "including the courts of the District of Columbia" in the legislative definition as supporting its theory that Congress manifested an intention to exclude legislative Courts. It argues that under existing judicial decisions the status of District of Columbia Courts as constitutional Courts was in doubt, and therefore it was necessary to refer to them specifically. The Court goes even further and suggests that the Congress was correcting legislatively a judicial error. The Court says:

In our opinion, the nature of the spirit and reason which prompted Congress to bring by express provision the courts of the District of Columbia within the purview of "any court of the United States" essentially suggests a legislative attempt to rectify in effect an apparent error appearing in the latest decision of the Supreme Court of the United States on the status of such courts at the time the Norris-LaGuardia Act was enacted, and but for which error there would have been no necessity to define the term "court of the United States" nor greater need to expressly include the courts of the District of Columbia therein than to expressly exclude the Supreme Court of the United States therefrom, Congress by Act of March 3, 1901, 31 Stat. 1199 (D. C.

Code [1940], Tit. 11, § 305) having deemed the court of first instance of the District of Columbia to be a "court of the United States." This error lay in the unmistakable language of the Court in *Ex Parte Bakelite Corporation*, 279 U. S. 438, 73 L. ed. 789, decided three years before the Norris-LaGuardia Act was passed, that the courts of the District of Columbia are legislative rather than constitutional courts. Indeed, a comparable spirit and reason motivated the passage of the Act itself in disapproval of *Duplex Co. v. Deering*, 254 U. S. 443, which as the Court indicated in *United States v. Hutcheson*, *supra*, emasculated the Clayton Act, so Congress believed, by unduly restrictive judicial construction. It was not until after the Norris-LaGuardia Act became law that the Court in *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356, judicially corrected the error by designating the declaration in the *Bakelite* case to be sheer *obiter dictum* and holding that the courts of the District of Columbia are constitutional courts in the historic meaning under Article III of the Constitution, thereby in effect affirming the legislative correction made by Congress.

The untenableness of the Court's theory that Congress was concerned with the constitutional or legislative status of the courts of the District of Columbia and was judicially overruling an error in *Ex parte Bakelite* is apparent from an examination of the *Bakelite* case. The Supreme Court was not even considering the District of Columbia Courts. It was considering the status of the Court of Customs Appeals, and held it to be a legislative court. In de-

veloping the history of constitutional and legislative Courts, the Court referred to decisions concerning the legislative status of territorial Courts, and in passing remarked:

A like view has been taken of the status and jurisdiction of the courts provided by Congress for the District of Columbia. These courts, this Court has held, are created in virtue of the power of Congress "to exercise exclusive legislation" over the district made the seat of the government of the United States, are legislative rather than constitutional courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of Article III, but are merely in aid of legislative or executive action, and therefore outside the admissible jurisdiction of courts established under that article".

This obvious *obiter* is not even referred to in the lengthy headnote to the case. It is buried away on the twelfth page of a twenty-three page decision. It is doubtful that it was even digested until it achieved prominence when the Attorney General dug it out in 1938 to support the government's position on *O'Donoghue v. United States*, 289 U. S. 510. The Supreme Court branded it *obiter* and disposed of it as follows:

The government relies almost entirely upon the decision of this court in *Ex parte Bakelite Corp.*, 279 U. S. 438. In that case we held that the Court of Customs Appeals was a legislative court, not a constitutional court under Article

III of the Constitution. In the course of the opinion attention was called to the decisions in respect of the territorial courts, and it was said that a like view had been taken in respect of the status and jurisdiction of the courts provided by Congress for the District of Columbia. This observation, made incidentally, by way of illustration merely and without discussion or elaboration, was not necessary to the decision, and is not in harmony with the views expressed in the present opinion. "It is a maxim, not to be disregarded", said Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399, "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated".

The Court's reliance on the obscure *obiter dicta* in the *Bakelite* case to manifest an intent by Congress to exclude legislative Courts by the use of the words "including the District of Columbia" is clearly untenable.

There is a much more reasonable explanation of the Congress' use of the words "including the courts of the District of Columbia". Congress was consider-

ing the Clayton Act which refers to "any district court of the United States or any court of the District of Columbia." (Clayton Act, *supra*, sections 21 and 23.) As we have seen, this includes the Federal District Courts for the territories and possessions which are legislative courts. The Court merely followed the precedent established in the Clayton Act in specifically referring to the District of Columbia. "Any court of the United States" as used in Section 20 of the Clayton Act, which the Norris-LaGuardia Act amends, embraces both territorial legislative Courts, District of Columbia Courts, and constitutional Federal District Courts.

Because Congress sits in the District of Columbia and is its sole legislator, specific provision for the District never escapes the attention of Congress. This is particularly so in reform legislation such as the Norris-LaGuardia Act as there is a wide divergence in sympathy and point of view between the sponsors of such legislation and the Southern Democrats who by their seniority control the District Committee and run the District.

The fact that the District is unique in status and its Courts differ in name accounts for specific reference to the District in the Norris-LaGuardia Act, the Clayton and other Acts.

To rely on the words "including the courts of the District of Columbia" in the legislative definition to manifest an intention to exclude from the Act's coverage two and one-half million people in the territories

and possessions of the United States who, like the people of the District, are subject to the plenary power of Congress, is patently absurd.

E. SECTION 10 OF THE NORRIS-LA GUARDIA ACT.

The Court next turns to Section 10 of the Act to determine what words "court of the United States" as used in that section mean. The Court says:

The purpose of section 10 of the Norris-LaGuardia Act (U.S.C. Tit. 29, § 110) in using the term "court of the United States" is to expedite appeals from such courts to the Circuit Court of Appeals, excluding by implication any court, such as circuit courts of the Territory, where review does not lie in that appellate court.

Section 10 of the Norris-LaGuardia Act provides:

Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

The provisions of this section giving an extraordinary appeal to Circuit Courts of Appeals present

no obstacle to construing the act as applicable to circuit courts of the Territory.

It is clearly within the power of Congress to permit a direct appeal from a territorial circuit court to the Ninth Circuit Court of Appeals. However, the question of Congress' intention as to whether such a right is created would be a subject for the Courts to decide. The determination must first be made as to whether a circuit court of the Territory is a "court of the United States" within the meaning of the legislative definition, or if that is held to be ambiguous the Act as a whole.

Since under the doctrine of the *Hutcheson* case, the rights under the Act are substantive, rather than procedural, the Act would not be permitted to fail because a Court found a particular procedural provision inapplicable. A Court might find that the Supreme Court of the Territory is an intermediate court of appeals between a circuit court and the Ninth Circuit Court of Appeals. Or it might find that the appellate procedure set forth in Section 10 inapplicable or invalid so far as circuit courts of the Territory are concerned but under the provisions of Section 14 of the Act, hold the remaining provisions applicable.

We have the word of Senator Walsh of the Senate Judiciary Committee that Congress regarded this procedural appeal section as inconsequential and the substantive rights as all important:

We have endeavored in the framing of the bill to take care of the matter of appeals as best we

possibly can; but no matter what we do about it, the appeal is no relief whatever, as the thing is all ended long before the appeal can be heard either one way or the other. Either the strike prevails or it does not prevail, so *the matter of appeal is* of no particular consequence. (Cong. Rec. Vol. 75, part 5, p. 4930.)

Assuming an ambiguity in the legislative definition, a failure or defect of a procedural character in respect to appeals cannot properly be used to diminish the scope of the act and destroy substantive rights created by it.

Thus in *New Negro Alliance v. Kaufman*, 78 F. (2d) 415; 303 U. S. 552, subsequently amended 304 U. S. 542, a procedural difficulty referred to was not regarded as setting aside the substantive rights under the Act. A suit for injunction in a labor dispute was begun in the District of Columbia. The appeal went to the Court of Appeals of the District of Columbia, and subsequently to the United States Supreme Court. The Court of Appeals held that it had authority to review, although it was not a "Circuit Court of Appeals" within the express language of the Norris-LaGuardia Act. In other words, the Court held that an appeal from the Courts of the District of Columbia would be governed, not by the Norris-LaGuardia Act, but rather by the District of Columbia Code. Notwithstanding this fact, the substantive provisions of the Norris-LaGuardia Act were held to govern, and the United States Supreme Court upheld the application of the Norris-LaGuardia Act to that case.

Where an act is of a broad social character and is intended to be administered and construed liberally to effect the social objective of preventing Courts from interfering in labor disputes on the side of the employer by the issuance of labor injunctions, Courts are required to interpret the Act to accomplish its purpose, and a resort to procedural provisions to frustrate the purpose is judicial legislation of the very kind which Congress overruled in passing the Act.

The Court summarizes its construction of Congressional intent to exclude legislative Courts, including Circuit Courts of the Territory, from the coverage of the Act as follows:

The meaning, then, of a "court of the United States", drawn from every part of the Norris-LaGuardia Act as well as from its caption "An Act * * * to define and limit the jurisdiction of courts sitting in equity * * *," is interpreted to be any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress under Article III of the Constitution and which court is one of the first instance, sitting in an equity case involving or growing out of a labor dispute, with authority therein to issue restraining orders and injunctions reviewable in either the Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia.

We have now discussed *seriatim* each of the premises relied on by the Court. For the reasons stated we believe each of these premises is untenable and the conclusion erroneous. It is apparent that the

Court's decision stands or falls on the basis of the Court's contention that Congress manifested an intention to exclude legislative Courts.

In the petition for rehearing error in the decision was alleged on the ground that the Sherman and Clayton Acts which the Norris-LaGuardia Act amends are applicable to the Territory and the provisions relating to Courts of the United States set forth therein include the Federal District Court of the Territory which is a legislative Court. The Court refused to pass on this contention but dismissed the argument with the contention that even if one legislative Court was covered by the Act that fact would support the Court's conclusion under the rule that the inclusion of one is the exclusion of the other.

The Court said:

Assuming *arguendo* without deciding that the urged construction is judicially sound, the Act's applicability under it to one legislative court specifically would constitute an exception to the Act's inapplicability under the court's interpretation to legislative courts generally. More pertinent, the construction would afford corroborative aid to such interpretation with respect to the Act's inapplicability to the second circuit court of the Territory. Clearly upon the principle of *inclusio unius est exclusio alterius* an intent to include within the jurisdictional limitations, placed by the Act upon comparable constitutional courts, the only legislative court in the Territory (the United States District Court for the District of Hawaii) which has the same federal jurisdiction, subject to the same limitations, as constitutional district courts, Congress

having declared that it "shall have the jurisdiction of district courts of the United States, and shall proceed therein in the same manner as a district court" (Or. Act § 86; 48 U.S.C.A. § 642), of itself would evidence in the absence of any manifestation to the contrary an intent to exclude therefrom the other (the second circuit court of the Territory) which has not federal but territorial jurisdiction and is not required to proceed in the same manner as a district court of the United States.

Since the Court's holding is based solely on the manifestation of an intent to include only constitutional Courts, a concession that the act applies to one legislative Court invalidates its decision.

The Court was required to pass upon the contention of counsel that the act applies to legislative Courts. If the Court found that even one legislative Court was included within the coverage of the act, its whole theory of the exclusion of legislative Courts falls, and its decision based on that theory is erroneous.

III.

THE NORRIS-LA GUARDIA ACT MUST BE GIVEN THE SAME SCOPE AND COVERAGE AS THE SHERMAN AND CLAYTON ACTS WHICH IT AMENDS.

Assignment of Error No. 6.

The Court erred in failing to give to the Norris-LaGuardia Act the same scope and coverage as the Clayton and Sherman Acts which the Norris-LaGuardia Act amended.

The Supreme Court of the United States in the *Hutcheson* case has laid down clear and well defined rules for the construction of the Norris-LaGuardia Act. The Court below did not deign to refer or discuss the portions of the Clayton Act dealing with the rights of labor, but looked only to the procedural provisions of the Clayton Act set forth in the Judicial Code. Yet the Court below cites with approval and relies on the *Hutcheson* case to establish the fact that the purpose of the Norris-LaGuardia Act was to amend the Clayton Act:

The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction.

Surely this language alone required the Court to turn to the provisions of the Clayton Act which the Norris-LaGuardia Act amended to determine the Congressional intent.

The Supreme Court does not stop with the statement of the underlying aim of the Norris-LaGuardia Act. It discusses at length throughout the entire decision the proper interpretation of Congressional intent as manifested by the Act and the rules of construction that are to be applied. The Supreme Court treats fully of the precise interrelation of the Sherman Act, the Clayton Act which amended it, and the Norris-LaGuardia Act which amended the Clayton Act. The Supreme Court describes these three Acts

as "these three interlacing statutes", and the Norris-LaGuardia Act as "one of a series of enactments touching one of the most sensitive national problems."

Justice Frankfurter after elaborating on the historic, economic and amendatory effect of these three statutes determined that it was necessary to read "the Sherman Law and Section 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of *outlawry of labor conduct*". The Attorney General in the *Hutcheson* case—which involved a criminal proceeding—contended that the Norris-LaGuardia Act applied only to injunction proceedings in Courts of equity—a narrow construction closely parallel to that on which the opinion of the lower Court rests. Justice Frankfurter speaking for the Court scathingly replied:

But to argue, as it was urged before us, that the Duplex case still governs for purposes of a criminal prosecution is to say that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison.
 * * * That is not the way to read the will of Congress, *particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems*. Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope to Congressional purpose even when meticulous words are lacking." *Keifer*

& *Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 391, and authorities there cited. (Italics ours.)

This is strong language indeed, and a reference to the *Kiefer* case cited by the Court emphasizes its forcefulness and scope. In that case the Court read into an Act of Congress a right to sue a government corporation even though Congress has concededly *failed to express its will in words*. The Court said at page 389:

This is not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes utilizing corporations for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit.

Reading the holding of the *Kiefer* case in context with the *Hutcheson* case where it is cited, the Supreme Court of the United States is saying that if Congress failed in any respect to put into words—or did not think to put into words—provisions necessary to carry out the clear purpose of the Norris-LaGuardia Act, Courts must nevertheless construe the Act to accomplish the purpose and public policy which Congress expressed.

Justice Frankfurter leaves no doubt that this is the mandate of construction the Court was positing for the Norris-LaGuardia Act. He continued:

The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: "A statute may indicate or require as its justification a change in the policy of the law although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however, indirectly that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of the duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 F. 30, 32.

The Court then applied the mandate to the Norris-LaGuardia Act read with the Clayton Act and the Sherman Act, stating:

The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by

the House Committee on the Judiciary. "The purpose of the bill is to protect the rights of labor in the same manner that Congress intended when it enacted the Clayton Act * * * which act, by reason of its construction and application by Federal Courts, is ineffectual to accomplish the congressional intent." * * * The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press Co. v. Deering*, supra, and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37, as the authoritative interpretation of Section 20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light Section 20 removes all such allowable conduct from the taint of being a "violation of any law of the United States", including the Sherman Law.

It must be obvious in the light of the foregoing that the Norris-LaGuardia Act must be read with the Sherman and Clayton Acts to construe the Act as the Supreme Court says it must be construed.

If the Court below had construed Congressional intent as directed by the Supreme Court of the United States it would have found no justification for giving the act the narrowest scope possible and holding it inapplicable to the Territory.

The Sherman Act of 1890 (15 U.S.C. 1-33) is specifically applicable to the Territory and represents an exercise by Congress of its plenary power

to legislate for the District of Columbia and the Territories. In the Sherman Act Congress exercised the full scope of its authority. So far as states are concerned it exercised its power to control interstate commerce. But in respect to the District of Columbia and the Territories it applied the restraint of the act in and within such areas as well as between such areas and states and foreign countries (Sections 1 and 3).

Throughout the act Congress refers to "the several district Courts of the United States" and "any district Court of the United States".

There is no doubt that these references include the legislative Courts of Territories as well as constitutional district Courts.

The Supreme Court has uniformly held that in passing the Sherman Act Congress left no area of its constitutional power unoccupied; it "exercised" all the power it possessed. *United States v. Frankfort Distilleries*, 65 S. Ct. 661; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495. In *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, the Supreme Court held that the power exercised by Congress in the enactment of the provision of Section 3 of the Sherman Act relating to restraint of trade or commerce exclusively within the District of Columbia, was its plenary power to legislate for the district, and therefore the meaning of this provision, unlike Section 1 of the Act dealing with states, is not limited by the scope of the power to regulate commerce.

Clearly under the language of Section 3 set forth above, which is the same for territories as for the District of Columbia, the same plenary power over territories exists and was exercised in its full scope by Congress. Thus Section 3 specifically declares illegal every contract, combination, conspiracy *in any territory or between any territory and another, or between a territory and a state, or a foreign nation*. No clearer manifestation of an intention to occupy the full scope of its power could be given by Congress.

The Clayton Act of 1914 (38 Stat. 73, 15 U.S.C. 12-17, 44; 18 U.S.C. 412; 28 U.S.C. 381-383, 386-390a; 29 U.S.C. 52, 53) was passed with a twofold purpose, the first of which was to exempt labor from the vice of the Sherman Act upon the theory, expressly stated in the Clayton Act, that "The labor of a human being is not a commodity or an article of commerce", and the second of which was to limit both the employment and the manner of employment of the labor in junction and to make lawful under all laws the activity which could not be restrained. Section 6 (15 U.S.C.A. section 17) sought to accomplish the first purpose, while Section 20 (29 U.S.C.A. section 52) as supplemented by other sections was to achieve the second purpose. Only twelve of the twenty-seven sections of the Act affect labor. None of the twelve is in the Judicial Code.

Section 6 (incorporated in Title 15, Commerce & Trade) provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the

anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

Section 20 (incorporated in Title 29, Labor) of the Act provides:

No restraining order or injunction shall be granted by *any court of the United States*, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between *persons* employed and persons seeking employment, involving, or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney;

And no such restraining order or injunction shall prohibit *any person or persons whether singly or in concert*, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or

persuading others by peaceful means so to do; or from attending at any place, where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to or withholding from, any person engaged in such dispute, any strike benefit or other moneys or things of value; or from peaceably assembling in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.* (Italics ours.)

Significantly, Section 52 of Title 28, Labor (Section 20 of the Clayton Act quoted above) is followed by Section 53 (Section 1 of the Clayton Act) which provides "The word 'person' or 'persons' wherever used in Section 52 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, *the laws of any of the Territories.* * * *"

It is also of great significance that the phrase "court of the United States" as used in Section 20 includes legislative district Courts of the territories and possessions. In short, the intent of Congress to exercise the full scope of its power in the Clayton Act is clear.

Now let us turn to the Norris-LaGuardia Act to see the interlocking and interrelation between the three Acts. We have already examined the manner in which that relationship has been held to operate by the Supreme Court of the United States. It surely must be conceded from the outset that there cannot exist a Sherman Anti-Trust law and a Clayton Act operating in one way in the Territory of Hawaii and in a totally different way in the rest of the United States.

Yet it is clear that this is the effect of this Court's decision since it has excluded Circuit Courts of the Territory on the theory that Congress intended to exclude legislative Courts of the United States—and that distinction necessarily means that both the Federal District Court of the Territory as well as the Circuit Courts of the Territory and the Supreme Court of the Territory are excluded from and not bound by the provisions of the Norris-LaGuardia Act since all are legislative Courts of the United States.

In short, the Court below is holding that Congress has twice failed—once in the Clayton Act and once in the amendatory Norris-LaGuardia Act to accomplish the purpose which it specifically expressed in regard to labor disputes—even though the provisions of the Sherman Act and the Clayton Act dealing with conspiracies in restraint of trade affect the Territory.

The Court below has thus, by judicial legislation, assigned, a different geographical and territorial operation to those parts of the Act affecting conspiracies

in restraint of trade and those limiting jurisdiction to issue injunctions in labor disputes and giving labor substantive rights.

Section 1 of the Norris-LaGuardia Act removes from the jurisdiction of Courts of the United States as therein defined power to issue restraining orders or temporary or permanent injunctions except in conformity with the provisions of the Act. It further provides that no "such restraining order or temporary or permanent injunctions" shall "be issued contrary to the public policy declared".

Section 2 of the Act declares the public policy of the United States and contains the mandate that the Act shall be interpreted in the light of that policy.

In substance, the declaration recognizes the helplessness of the individual unorganized worker and the consequent necessity that he "have full freedom of association, self-organization and designation of representatives of his own choosing to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization, or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection".

When this declaration of policy is considered in the framework of the social and economic conditions which existed in 1932, it surely cannot be denied that it inaugurated a wholly new concept in the law of

the land in regard to labor. It swept from the books a long series of judicial anti-labor legislation beginning with the famous *Danbury Hatters* case, *Loewe v. Lawler*, 208 U. S. 274, in 1908 and continuing through *The Bedford Co. v. Stone Cutters Assn.*, 274 U. S. 37, in 1927.

The Norris-LaGuardia Act and its public policy declaration was the opening cannon of the New Deal of Franklin Delano Roosevelt. Certainly employers howled with rage at its inauguration. The States Righters and White Supremists harangued the Congress during its passage.

Economically, the passage of the Act and the declaration of its policy fits into the picture at the end of the most catastrophic economic depression ever known to the United States made so because the purchasing power of America's millions of consumers had reached such an unprecedented low that there were no markets for production.

That working men considered the passage of the Act and the declaration of policy the dawn of a new day is clearly indicated by the sharp upswing in organization which followed the passage of the Act. The Supreme Court in the *Hutcheson* case leaves no room for doubt that this public policy must be made fully effective.

Section 3 provides that yellow-dog contracts shall thenceforth be unenforceable. This section certainly does more economically and socially than limiting the power of Courts to enforce such contracts. It makes

the contracts against public policy. Certainly to the minds of employers, it infringed rights of substance which had netted them in the preceding years of our history many millions of dollars of profits. Neither the Judicial Code nor the Clayton Act previously dealt with or affected yellow-dog contracts under which employers had for years exacted promises to refrain from joining or associating with their fellow workers as a condition to being chosen from the great mass of unemployed to work for a miserable wage.

Section 4 enumerates the specific acts which cannot be the subject of restraining orders or injunctions. As the Supreme Court says in the *Hutcheson* case, this opens up a whole new area of allowable labor conduct which cannot be limited either by Courts of equity or made the basis for criminal proceedings.

Section 5 removes from the jurisdiction of Courts the power to issue restraining orders or temporary or permanent injunctions for doing in concert the specific acts enumerated in Section 4 on the theory that such acts constitute unlawful combinations or conspiracies.

Sections 6 provides that no officer or member of any association or organization, or no association or organization participating in or interested in a labor dispute shall be held liable for the unlawful acts of individual members or agents except upon clear proof of actual participation in or authorization or ratification of such acts after actual knowledge.

Section 7 enumerates the conditions precedent to the granting of restraining orders or temporary or permanent injunctions in labor disputes.

Section 8 provides that noncompliance with obligations of collective bargaining or compliance with legal procedures, or failure to make a good faith effort to settle disputes by negotiation or arbitration shall prevent injunctive relief.

Section 9 requires Courts to make findings of fact, and to grant restraining orders or injunctions, in strict conformity with other provisions of the act, only on the basis of such findings of fact and to include prohibitions only of such specific acts as are complained of.

Section 10 provides for extraordinary and speedy review by Circuit Courts of Appeal on both the denial and granting of restraining orders and injunctions.

Section 11 provides for the speedy and public trial by jury of persons charged with contempt of restraining orders and injunctions issued in conformity with the Act.

Section 12 gives the defendant in any contempt proceedings a right to peremptorily demand the retirement of the judge if the contempt arises from an attack on the character or conduct of the judge.

Section 13 of the Act contains the legislative definitions of the terms in the statute. Since the Act applies in cases involving labor disputes the definition contained in Section 13(c) is extremely important. A

labor dispute is defined as “any controversy concerning terms or conditions of employment, or concerning the association or representation of persons negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee”. This section also defines the term “court of the United States” as used in the Act. The definition of labor disputes goes far beyond the scope given that term in the Clayton Act, *and the definition of “court of the United States” is the most comprehensive that Congress could frame without exceeding its powers.*

Section 14 provides that if the application to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of such sections and the application of such provisions to other persons or circumstances shall not thereby be affected.

Section 15 repeals all acts and parts of acts in conflict.

Surely no single section or word of this Act can be seized upon to manifest an intention to give the Act a narrower scope than the Clayton Act which applies in and to the Territory. To assign such an intention, as the Court below has done, leaves in effect in the territories and insular possessions the discarded judicial interpretations of the Clayton Act which the Supreme Court says were overruled by the Norris-LaGuardia Act, and leaves the state of the

law in the Territory in utter confusion. Thus since the Norris-LaGuardia Act does not apply to the Territory but the Clayton Act does, is the Clayton Act to be read as interpreted by the Supreme Court before its "broad purposes were restored" or does it lie dormant on the books unaffected by the restoration which took place elsewhere?

Congress in passing the Norris-LaGuardia Act was amending the Clayton Act, as the Court below concedes—but not, as the Court assumes throughout its opinion the portions contained in the Judicial Code. By passing the Act the United States Supreme Court in the *Hutcheson* case says that Congress "reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as re-defined by the latter Act", thus removing all such allowable conduct from the taint of being a "violation of any law of the United States", including the Sherman Act. The Court continued:

There is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict. And since the facts in the indictment (peaceful picketing) are made lawful by the Clayton Act in so far as "any law of the United States" is concerned it would be idle to consider the Sherman Law apart from the Clayton Act as interpreted by Congress. * * * It was precisely in order to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all the tangled verbalisms and enumerated concretely the types of activities

which had become familiar incidents of union procedure.

Surely when the Sherman, Clayton and Norris-LaGuardia Acts are read together, as the United States Supreme Court directs, it becomes apparent that the proper place to look for the meaning of the words "court of the United States" as defined by the Act—if, indeed the definition can, after reading these three acts together, be held to be ambiguous—is to the Sherman and Clayton Acts both of which use the words "courts of the United States" and in both of which "courts of the United States" are used to include federal Courts of the United States in territories and insular possessions. It is also clear that in these first two in a series of three Acts that the Court exercised the full scope of its authority and directed that the provisions of the Acts apply *in* and to the territories. All rules of construction dictate that the same scope shall be attributed to the amending Norris-LaGuardia Act as is given to the Acts which it amends.

IV.

THE NORRIS-LaGUARDIA ACT IS AN EXERCISE BY CONGRESS OF ITS PLENARY POWER TO LEGISLATE FOR THE TERRITORY.

Assignment of Error No. 7.

The Court erred in failing to construe the Norris-LaGuardia Act as an exercise by Congress of its plenary power to legislate for the Territory of Hawaii.

For the reasons set forth under Point III above, there can be no doubt that the Sherman, Clayton and Norris-LaGuardia Acts represent exercises by Congress of their plenary power to legislate for the Territory.

The Clayton and Norris-LaGuardia Acts, as interpreted by the Supreme Court in the *Hutcheson* case

1. exempt labor organizations involved in labor disputes from the anti-trust provisions of the Sherman and Clayton Acts,

2. drastically limit the power of federal Courts to issue injunctions in labor disputes,

3. specifically provide that all the labor union activity defined in the Norris-LaGuardia Act shall not be held or considered to be violations of any law of the United States.

Thus all the labor union activity specified in the Norris-LaGuardia Act is lawful in the Territory.

As we read the Norris-LaGuardia Act Congress manifested in the legislative definition and the Act as a whole a specific intention to legislate for territorial courts including Circuit Courts. This intention was manifested by going beyond the Clayton Act—where “courts of the United States” was used to mean both constitutional and legislative federal district courts—and specifically defining this phrase to mean any court for which Congress can constitutionally legislate.

But even if this construction of congressional intent is rejected, Circuit Courts, because of the exercise

by Congress of its plenary power, have no jurisdiction to restrain activity made lawful under all laws of the United States.

By the Organic Act (48 U.S.C. 519, 562) the legislative power of the Territory is limited "to all rightful subjects of legislation *not inconsistent* with the Constitution and laws of the United States." The legislative exercising power delegated by Congress could not empower Circuit Courts either by grants of general equity jurisdiction or specific statute, to restrain activity specifically made lawful under all laws of the United States.

The Court below refused to recognize the Norris-LaGuardia Act as an exercise by Congress of its plenary power to legislate for the Territory, held the Act inapplicable to Circuit Courts and refused to issue a perpetual writ of prohibition against a circuit judge who violated both the substantive and procedural provisions of the Act.

V.

THE NORRIS-LA GUARDIA ACT IS NOT A NARROW PROCEDURAL ACT. IT CONFERS SUBSTANTIVE RIGHTS ON ALL PERSONS AND ORGANIZATIONS IN THE TERRITORIES AND POSSESSIONS OF THE UNITED STATES FOR WHOM CONGRESS CAN CONSTITUTIONALLY LEGISLATE.

Assignment of Error No. 8.

The Court erred in construing the Norris-LaGuardia Act as a narrow procedural act affecting only the jurisdiction of constitutional courts sitting in equity.

The Court below construed the Norris-LaGuardia Act as a narrow procedural act affecting only the jurisdiction of constitutional courts sitting in equity. The procedural phases of the Act are secondary in importance to the substantive rights.

The Norris-LaGuardia Act guarantees to labor the right to engage in certain clearly defined types of activity without previous restraint by injunction or fear of subsequent punishment in federal criminal courts and territorial courts. This conclusion is mandatory when the Norris-LaGuardia Act is read, as the Supreme Court has held Congress intended, in conjunction with Section 20 of the Clayton Act. The Act protects these rights of labor in two ways:

1. By the creation of substantive rights to engage in these activities free from fear of subsequent criminal prosecution under any law of the United States.

2. By the absolute prohibition against their restraint by courts of the United States sitting in equity.

“The Norris-LaGuardia Act”, the Supreme Court said in *U. S. v. Hutcheson*, 312 U. S. 219, “reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light Section 20 removes all such allowable conduct from the taint of being ‘violations of any law of the United States’, including the Sherman Law.”

What are these “immunized trade union activities”—these substantive rights guaranteed by Section 20 of the Clayton Act as amended by the Norris-LaGuar-

dia Act—which shall not be considered or held to be violations of any law of the United States?

1. The right to be free from yellow-dog contracts which are made unenforceable and void as against public policy. (29 U.S.C.A. 103.)

2. In any labor dispute, as broadly defined in the Act, to do *singly and in concert* all the acts specifically enumerated in Section 104.

If there can be any question of the conferring on labor of substantive rights by the Norris-LaGuardia Act in the light of the discussion of “immunized trade union activity” in the *Hutcheson* case, the March 10, 1947, decision of the Supreme Court of the United States in *United Brotherhood of Carpenters, et al. v. United States*, 91 L. ed. 705, answers it. In that case, the United States was prosecuting certain labor unions and trade associations for violations of the Sherman Act. The unions were subject to the Sherman Law because there was evidence that they had conspired with their employers and hence were not, under the rule laid down in *Allen Bradley v. Local Union No. 3*, 325 U. S. 805, immune from prosecution under the Sherman law. The question decided in the *Carpenters* case was that Section 6 of the Norris-LaGuardia Act—which limits the liability of officers and members of associations (labor and employer) for the unlawful acts of individuals to acts of agents where there is clear proof of actual participation in actual authorization of, or ratification of such unlawful acts after actual notice—is applicable to criminal prosecutions under the Sherman law.

It must be borne in mind that the Norris-LaGuardia Act does not refer to the Sherman law, and this holding which permits provisions of the Norris-LaGuardia Act to be invoked under the Sherman law is therefore an authoritative holding that the Norris-LaGuardia Act confers substantive rights.

The Court says in its opinion in discussing Section 6 and its applicability:

We need not determine whether Section 6 should be called a rule of evidence or one that changes the substantive law of agency. We hold that its purpose and effect was to relieve organizations, whether labor or capital and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization without clear proof that the organization, or member, charged with the responsibility for the offense, actually participated, gave prior authorization, or ratified such act after actual knowledge.

The Court says it does not decide the question of whether Section 6 changes the "substantive law of agency." This reference is to the effect of the section on agency law. It is the holding that this section of the Norris-LaGuardia Act can be invoked under the Sherman Act that constitutes a holding that the Norris-LaGuardia Act gives substantive rights.

In June, 1945, in *Allen Bradley Co. v. Local Union No. 3*, supra, the Supreme Court reaffirmed its position in the *Hutcheson* case and referred to the "specified acts" declared by Section 20 (as amended by the

Norris-LaGuardia Act) not to be violations of federal law.

In *Wilson & Co. v. Birl*, 27 F. Supp. 915, 105 F. (2d) 948, the Court recognized the existence of substantive rights:

The Norris-LaGuardia Act, * * * was intended to limit drastically the power of the Federal courts to issue injunctions in labor disputes. In fact, it might be said in a general way that the purpose was to put an end to it, except for a residue of jurisdiction necessary for the protection of property against destruction by violence or fraud. To accomplish the purpose of the act, Congress enumerated in § 4 various types of conduct as to which jurisdiction to enjoin was taken away. The list covered a wide field of labor conflict activities *and impliedly recognized the conduct in question as legitimate measures of offense and defense in labor disputes*. In this enumeration the act is wholly objective. It is not concerned with the purpose for which the acts are done or with the state of mind of the participants or with any question of intent, expressed or presumed. The law makes no distinction between doing the acts in question with a legal object in view and doing them with an illegal object. * * * In short, it was an adoption of the philosophy of Justice Brandeis' dissenting opinion in *Duplex Printing Co. v. Deering* (1921), 254 U.S. 443, 65 L. ed. 349, 41 S. Ct. 172, 183, 16 A.L.R. 196, which condemned the point of view which made conduct actionable "when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful."

The Supreme Court of Illinois in *Fenske Bros. v. Upholsterers' International Union*, 358 Ill. 239, in interpreting and holding constitutional the Illinois little Norris-LaGuardia Act held the act made lawful the acts courts were prohibited from restraining:

The statute does not in express terms declare the acts lawful which may not be restrained by injunctive process, but it is apparent from the context of the act that the legislative intent was to permit them to be done, otherwise it would follow that the Legislature attempted to authorize the doing of acts which it recognized were unlawful. Such a construction of the statute leads to an absurd consequence and is to be avoided. Statutes are to be interpreted according to their intent and meaning. (Citing cases.) Our conclusion is that the Legislature intended to legalize the acts mentioned in the statute.

The Supreme Court of Wisconsin interpreting the Wisconsin little Norris-LaGuardia Act—which is in form almost identical with the federal statute—in *American Furniture Co. v. International Brotherhood of Teamsters*, 268 N.W. 250, said:

The question is whether the Legislature may declare lawful acts on the part of workingmen or groups of them that in its judgment are necessary in order to balance the capacity for economic duress which past conditions have created in the employer. We discover no constitutional provision which denies this power to the Legislature. The evils which may and do flow from the natural bargaining advantage held by the employer may be recognized as calling for legislative correction

and conceivably may be met in a variety of ways. It has here been met by equalizing the bargaining power of labor and leaving the determination of wages and working conditions to the play of economic forces.

* * * * *

When the Legislature makes peaceful picketing valid under certain prescribed circumstances, it leaves nothing for an injunction to operate upon. *The provisions of such a law are substantive in character.*

For the reasons already stated we believe it is clear that the Norris-LaGuardia Act applies to the Territory. It is clear also that the substantive rights guaranteed by the Act apply to persons in the Territory, for as we have seen the Norris-LaGuardia Act amends the Sherman and Clayton Acts which represent an exercise by Congress of its plenary power to legislate for the District of Columbia and the territories. These laws are clearly locally applicable to the Territory. The territorial legislature has no power to enact laws inconsistent with the laws of the United States. Hence even a specific criminal statute making unlawful activity described as lawful under these acts would be a nullity.

It is beyond question that Congress may change the substantive law of the United States and of the territories, and in doing so may increase or reduce the subject-matter upon which the territorial legislature may legislate. Congress may enact a statute creating a crime or repeal such a statute. If Congress does not

blanket the field, so to speak, the territorial legislature still has power to legislate so long as its enactment is not inconsistent with the federal law.

It is an elementary principle of construction that a statute will not be construed so as to result in absurdity. Innumerable absurd consequences would flow from holding the Norris-LaGuardia Act, and the provisions of substantive law contained therein, not applicable in the Territory.

1. Since Congress specifically exercised the full scope of its authority and exercised its plenary power to legislate for the Territory in the Sherman and Clayton Acts, the same scope must of necessity be given to the Norris-LaGuardia Act which amends the Clayton Act. Else it would follow that a different Clayton Act and a different Sherman Act are in force in the Territory than in the forty-eight states and the District of Columbia.

2. The Territory, its law enforcement officers, and its courts could act in flagrant disregard of the announced public policy of the United States, and could restrain and punish as crimes acts which are specifically made lawful under all laws of the United States.

3. Yellow-dog contracts made void and unenforceable by Congress could be enforced in courts of the Territory by the same token as the territorial courts could disregard all other substantive rights given under the act.

4. A public policy developed after years of struggle and agitation would be denied effectiveness and the

cancerous condition which provoked its formulation would remain in an area over which Congress concededly has authority to destroy it. It is inconceivable that Congress should have intended this result.

5. A long line of Supreme Court decisions, which Justice Brandeis described as "reminding of involuntary servitude" legislatively overruled by Congress in the Norris-LaGuardia Act as it amended Section 20 of the Clayton Act, remain binding precedents in the Territory, but obsolete elsewhere.

6. Substantive rights accruing to working men and women in the Territory by Act of Congress would be drained of all substance by territorial courts, and what is specifically lawful might even be punished as crime.

It is clear that the construction of the act by the lower court sanctions an evasion of the substantive rights guaranteed thereunder and the public policy declared therein, even though the natural meaning of the words not only does not require it but requires a totally different construction.

VI.

THE NORRIS-LaGUARDIA ACT MUST BE INTERPRETED TO EFFECT THE DECLARED PUBLIC POLICY OF THE UNITED STATES.

The Court's decision contravenes the public policy of the United States declared in the Norris-LaGuardia Act and fails to give it a uniform application consistent with the manifest intent and direction of Congress.

It is apparent from the public policy declared in the act that Congress set out to establish a new era of labor relations in so far as it was within the power of Congress to do so. Section 2 provides:

In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

The Supreme Court in the *Hutcheson* case stated this canon of construction for the policy declaration and the Act as a whole:

A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur in the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.

The policy is clear and unambiguous. It remains only for the Courts to give it effect.

We believe that when Congress makes a declaration in strong, unequivocal language of public policy for the United States, it is reasonable to assume that Congress intended that public policy to govern every part of the United States to which Congress could constitutionally make it apply. We believe that a reading of the Act as a whole including the statement of policy and the legislative definition of "court of the United States" shows a clear intention to apply the act to the limit of the powers of Congress. To suppose that Congress felt the social policy was good for the mainland and not for the territories is implying a contradictory and fictitious intent.

The Norris-LaGuardia Act is operative in the field of labor law. It abrogated the common law and many years of judicial decisions because Congress deemed it in the interest of the general welfare to protect the rights of American workers to organize. The Court

in its opinion fails to accord proper weight to the declaration of public policy.

To determine the true meaning of the purpose and policy of the Act, it is proper—as the Supreme Court has done—to look at the causes that gave rise to the Act and statements in the Congressional debates as to what Congress expected the Act to accomplish.

Mr. Greenwood of Indiana—from the same district where the infamous *Bedford Stone Cutters* case arose—spoke with feeling of that which he knew:

This legislation is the outgrowth of historic study and experience in the matter of handling labor disputes, and I think the time has come when industry must recognize the right of labor to have unions and to deal with the members of the union collectively and bargain with them collectively so that there may be mutuality and equity on both sides of any controversy that may arise between capital and labor.

* * * * *

They have gone far beyond the American idea of justice and equality, in denying the working man the same privileges that are given to people on the outside who do not belong to a union and who are not employed. If the Constitution means anything in the matter of freedom of speech, it should be applied just as fully to men who belong to a union, and just as fully when they are out on a strike as on any other occasion.

I say that such injunctions have reached the point where they are indefensible, and the Congress ought to undertake to define this jurisdiction in order that the constitutional rights and privileges

of men who labor and belong to unions may not be in any way infringed. (Cong. Rec. Vol. 75, part 5, pp. 5466-67.)

Senator Norris, the drafter and sponsor of the bill, spoke with equal feeling:

The hardship and the injustice brought about by the issuing of injunctions by Federal judges in labor disputes have been the subject of discussion for a number of years. The evils arising from such injunctions have been universally recognized. A public sentiment for relief through these years has gradually grown until the universal opinion of the patriotic people has crystallized into a demand for legislative relief.

Both the great political parties in their last national convention took a definite stand in favor of the passage of legislation by Congress which would give relief to the evils and the wrongs brought about by the issuing of injunctions in labor disputes. (Cong. Rec. Vol. 75, part 4, p. 4502.)

In presenting the Bill to the Senate, Senator Norris read each section and explained its purpose. He characterized Section 1, which says "no court of the United States shall have jurisdiction * * *" *as a preamble to the public policy*. After reading the declaration of public policy, he said:

If the act or any part of it should be involved in any litigation where an injunction was issued or asked for, the judge before whom such action was pending would be required to give full force and effect to the public policy thus declared by the

act; and, *having in mind the public policy thus declared, he would be able to so construe the various provisions of the act as to give full effect and validity to the public policy thus declared.* (Cong. Rec., Vol. 75, part 4, p. 4503.)

Here is the mandate: The public policy is the law. The other provisions of the Act are to be construed to fully effect it. The limitations on the jurisdiction of courts is a mere preamble to the public policy. Does this, then, justify a construction which considers only the procedural aspects of the Act?

We have the authoritative word of the Supreme Court that Congress intended to so tie the hands of courts that they could not again emasculate the Clayton Act or hold trade union activity defined by the Clayton and Norris-LaGuardia Acts unlawful:

The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press Co. v. Deering*, supra, and *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association*, 274 U. S. 37 * * * as the authoritative interpretation of Section 20 of the Clayton Act, for Congress now placed its own meaning upon that section.

We believe the intent of Congress to make this public policy effective over all areas for which it could constitutionally legislate is clear and unmis- takeable. Because of the limitations placed on Congress by the Constitution it could not affect state Courts. But by virtue of the Constitution it has plenary control over and power to legislate for Territories.

Surely no intention of Congress to permit territorial legislatures or Courts—which exercise power delegated by Congress to operate—in violation of the Act and the policy declared therein can be presumed.

Mr. LaGuardia, co-author and House Sponsor of the bill, clearly expressed the intent of Congress to act in respect to all areas over which it had power. After explaining that the bill prevented Federal Courts from being used as an agency for strike-breaking and as an employment agent for scabs to break lawful strikes, he continued:

The bill does not take one iota of jurisdiction—*because we have not the power*—from the State Courts and does not change any State law. (Cong. Rec. Vol. 75, part 5, p. 5478.)

But Congress does have power over Territorial Courts, and the public policy and legislative definition indicate that they intended to and did exercise that power.

VII.

A JUDGE OF A CIRCUIT COURT OF THE TERRITORY OF HAWAII HAS NO JURISDICTION TO ISSUE A RESTRAINING ORDER IN A CASE GROWING OUT OF A LABOR DISPUTE.

Assignment of Error No. 10

The Court erred in holding that the defendant Cable A. Wirtz as Judge of the Circuit Court of the Second Judicial Circuit had jurisdiction to issue a temporary restraining order in a case growing out of a labor dispute.

For the reasons set forth under Points I-VI, we believe that a Circuit Court of the Territory is without jurisdiction to issue a restraining order or injunction in a case involving or growing out of a labor dispute except in strict conformity with the provisions of the Norris-LaGuardia Act, and is without jurisdiction to issue a restraining order or injunction in such a case which contravenes substantive rights guaranteed by the Norris-LaGuardia Act. This result involves no strained or twisted construction of the Act, nor even a reading into the Act of words not contained therein in order to carry out the will of Congress as it has been expressed by Congress and construed by the Supreme Court.

There is only one alternative to holding the procedural and substantive provisions of the Act binding on Circuit Courts of the Territory. That alternative is a construction that Congress intended to confer exclusive jurisdiction under the Act on the Federal District Court for the Territory of Hawaii, and that only that Court, in strict conformity with the Act, has power to issue temporary or permanent injunctions in cases involving or growing out of labor disputes in the Territory.

This result affects the public policy declared by Congress and gives full scope to the substantive and procedural sections of the Act.

As shown in Points III and IV, the Sherman and Clayton Acts by their terms apply in and to the Territory, and the obligations of enforcement and

restraints on jurisdiction are therein placed upon Federal District Courts of the United States including the Federal District Courts of the Territory. The Norris-LaGuardia Act amends the Clayton Act and therefore must also apply to the Territory unless a strained construction nullifying the express intent of Congress and contravening the decision in the *Hutcheson* case is adopted.

There can be no doubt that the words "Courts of the United States" as used in the Norris-LaGuardia Act, even without reference to the legislative definition, must be given the same scope as that phrase is given in the Clayton Act. If it be held that the legislative definition does not extend or manifest an intent to include Circuit Courts of the Territory, then it must be held that Territorial Federal District Courts have exclusive jurisdiction under the Act.

If only Federal District Courts of territories can exercise, in conformity with the Act, jurisdiction in the field of labor injunctions, then the respondent judge was without jurisdiction and the Court should have granted the perpetual writ of prohibition.

CONCLUSION.

A PERPETUAL WRIT OF PROHIBITION SHOULD HAVE BEEN GRANTED AGAINST RESPONDENTS.

Assignment No. 1

The Supreme Court of the Territory of Hawaii, hereinafter referred to as the "Court", erred in making and entering its Opinion and Decision on the 4th day of December, 1946, in the above-entitled court and cause.

Assignment No. 2

The Court erred in making and entering its judgment on the 19th day of December, 1946, in the above-entitled court and cause.

Assignment No. 3

The Court erred in making and entering its Opinion and Decision denying the Petition for Rehearing on the 23rd day of January, 1947, in the above-entitled court and cause.

Assignment No. 11

The Court erred in dissolving the temporary writ in dismissing the petition for writ of prohibition, and in denying a permanent writ of prohibition again the defendants below, appellees here.

The perpetual writ of prohibition should have been granted because the respondent judge was without jurisdiction to issue the ex parte temporary restraining order complained of either because:

1. Circuit Courts of the Territory are Courts of the United States, as defined by and within the meaning of the Norris-LaGuardia Act; or,

2. The Norris-LaGuardia Act confers substantive rights which accrue to residents of the Territory, the exercise of which cannot be restrained by Circuit Courts of the Territory; or

3. The Federal District Court of the Territory has exclusive jurisdiction to issue injunctions in labor disputes.

The existence of a labor dispute and the failure to comply with the Norris-LaGuardia Act were admitted by both respondents. The Supreme Court of the Territory was, therefore, required by law to grant a permanent writ of prohibition against respondents restraining them from proceeding in the equity cause pending before the respondent judge.

Dated: Honolulu, T. H., this 5th day of July, 1947.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,
HARRIET BOUSLOG,

MYER C. SYMONDS,

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Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

SUPREME COURT OF HAWAII

Syllabus.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO): LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO): UNIT 1, LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO): JOSEPH KAHOLOKULA, SEICHI DOI, HARRIS YOSHIO NAGATA, BENJAMIN AWANA, FRANK MATSUI, GEORGE FERNANDEZ, ERNEST FERNANDEZ, CHARLES REVERA, JOHN DOE, MARY DOE, RICHARD DOE, ET AL. v. CABLE A. WIRTZ AS JUDGE OF THE CIRCUIT COURT OF SECOND JUDICIAL CIRCUIT OF THE TERRITORY OF HAWAII AND MAUI AGRICULTURAL COMPANY, LIMITED.

No. 2637.

PETITION FOR WRIT OF PROHIBITION.

ARGUED NOVEMBER 14, 1946. DECIDED DECEMBER 4, 1946.

KEMP, C. J., LE BARON, J. AND CIRCUIT JUDGE

PENCE IN PLACE OF PETERS, J., ABSENT.

The Norris-LaGuardia Act (Mar. 23, 1932, 47 Stat. 73, c. 90, §§ 1-15; U. S. C. [1940] Tit. 29, §§ 101-115) does not apply to a Circuit Court of the Territory nor is such a "Court of the United States" as defined by and within the meaning of that Act of Congress.

Opinion of the Court by Le Baron, J.

The petitioners filed in this court their petition for writ of prohibition to prevent the respondents from proceeding further in, except to dismiss, a certain equity case pending below in the Circuit Court of the

Second Judicial Circuit of the Territory of Hawaii. The grounds of the petition are (1) that the case involves and grows out of a labor dispute within the meaning of the Norris-LaGuardia Act of Congress (Act of March 23, 1932, 47 Stat. 73, c. 90, §§ 1-15; U. S. C. [1940] Tit. 29, §§ 101-115), (2) that the Second Circuit Court is a "Court of the United States" as defined by and within the meaning of the Act and (3) that the respondent Wirtz as judge thereof issued at the instance of the other respondent a restraining order against the petitioners which, although admittedly in conformity with the laws of the Territory, was not in strict conformity with the provisions of the Act. A temporary writ of prohibition was duly issued. The respondents answered and admitted therein the first and third ground of the petition but denied the second, alleging that the Act of Congress does not apply to Circuit Courts of the Territory of Hawaii.

The pleadings present but one question of law. Is a Circuit Court of the Territory a "Court of the United States" as defined by and within the meaning of the Norris-La Guardia Act so as to render its provisions applicable? The answer depends upon the legislative intent of Congress. Preliminary to the determination of that intent, it is proper to ascertain whether the Act is an original enactment or merely an amendatory one.

Considering the Act including its caption as a whole, it is clearly and unmistakeably not an original enactment but in the nature of an amendatory Act in the sense that it relates to the same subject matters dealt

with by a prior and existing statute. This is forcibly brought out by the Supreme Court of the United States in *United States v. Hutcheson*, 312 U. S. 219, 236, 85 L. ed. 788. In that case the Court said: "The underlying aim of the Norris-La Guardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction." (See Act of Oct. 15, 1914 [38 Stat. 730]. Also *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552, 562, 82 L. ed 1012.) Consistent therewith, the Norris-La Guardia Act by its caption "An Act to Amend the Judicial Code * * *" professes to be an emendation of that Code which significantly contains portions of the Clayton Act. At this juncture a brief history of the Judicial Code and its background would not be amiss.

The rudiment of the present federal judicial system of the United States originated in 1781 with the final adoption of the Articles of Confederation under which a congressional court was created, primarily for the purpose of settling boundary disputes between the then States of the Union. This Court went out of existence upon the adoption of the Constitution in 1787, which vested "the judicial Power of the United States * * * in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," the Supreme Court being granted therein appellate jurisdiction generally and original jurisdiction in certain cases. (Const. Art. III, §§ 1, 2.) The federal judicial system, thus installed as an engine in

the tripartite machinery of the government of the United States by the terms of its enabling constitutional provision, consists of two classes of courts,—the Supreme Court, fixedly established as the great Court of last resort, and that undefined class of inferior Courts not even given a name by the Constitution, which Courts may be established or abolished and whose jurisdiction may be conferred or defined or enlarged or limited by Congress at will in response to the changing needs of society. (*Kline v. Burke Constr. Co.*, 260 U. S. 226, 234, 67 L. ed. 226; *Cinderella Theater Co. v. Sign Writers' Local Union*, 6 Fed. Supp. 164, 168; *United States v. Haynes*, 29 Fed. 691, 696.) These Courts are commonly referred to as federal Courts to distinguish them from territorial and state Courts. They uniformly have been designated by judicial definition to be “constitutional courts” in contradistinction to “legislative courts,” the latter created by Congress under the power granted under Article IV of the Constitution to make “all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” Within the designation of legislative Courts are admittedly the Circuit Courts of the Territory created by the Hawaiian Organic Act of Congress, section 81. (See *Mookini v. United States*, 303 U. S. 201, 82 L. ed. 748; *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356; *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693.)

On March 3, 1911, Congress adopted the present Judicial Code, which as of December 7, 1925, is em-

bodied in the "United States Code" where it occupies the first thirteen chapters of Title 28. (36 Stat. 1087 to 1169, inclusive.) It was the first successful attempt to place in codified form the numerous prior statutes of Congress affecting the federal judiciary. The Code deals primarily with the District Courts, Circuit Courts of Appeals, Court of Claims, Court of Customs and Patent Appeals and Supreme Court of the United States, devoting its first five chapters to the District Courts, its next four *seriatim* to the other Courts, the next two to certain of them as Courts of the United States and the remaining two of the thirteen chapters to general and repealing provisions affecting the Code. It deals incidentally with territorial and state courts, but only to the extent that the final decisions or judgments of their highest Courts may come within the appellate jurisdiction of the Circuit Court of Appeals and Supreme Court, respectively. The District Courts, Circuit Court of Appeals and Supreme Court, referred to in the Code as "Courts of the United States," are constitutional Courts and form one federal judicial system. Suggestive of a substantial affinity in jurisdiction and authority, the phrase "any District Court of the United States" is twice mentioned in the alternative with that of "any Court of the District of Columbia." (U. S. C. c. 10, §§ 386, 388.) The Court of Claims and Court of Customs and Patent Appeals, referred to in the Code by name only, are legislative Courts, and are not within the same federal judicial system as District Courts. Nor are their decisions or judgments reviewable in the Circuit Court of Appeals,

but in the Supreme Court and no other. (U. S. C. c. 7, § 288, c. 8, § 308.)

The only radical change made by the Judicial Code was the abolition of the Circuit Courts of the United States and the transfer *in toto* of the original jurisdiction they exercised prior to January 1, 1912, to the District Courts of the United States (36 Stat. 1167) which thereby became and now are the only federal Courts of first instance, both criminal and civil, at law and in equity. (See *Wogan Bros. v. American Sugar Refining Co.*, 215 Fed. 273.) Since its adoption other statutes and portions thereof from time to time have been added but they constitute mere continuations and where its parts relate to the same subject matter their interrelation requires that they all be considered as a whole whenever necessary to the proper interpretation of any of its parts.

The portions of the Clayton Act (Oct. 15, 1914, c. 323, §§ 17-19, 21-25, 38 Stat. 737-740), incorporated into the Judicial Code at the time the Norris-La-Guardia Act was enacted, all appear in chapter ten of the Judicial Code, constituting sections 381 to 383 and 386 to 390, inclusive, of the United States Code and all relate in subject matter to the Norris-La-Guardia Act. Some likewise relate to and immediately precede section 384 in which appears the phrase "any Court of the United States." Such phrase as therein used was held by this Court in *Kainea v. Kreuger*, 30 Haw. 860, not to apply to Circuit Courts of the Territory. Others appear under the same caption with section 378 which deals exclusively with the Supreme Court of the United States and the Dis-

trict Courts of the United States. Consonant thereto, section 371 of the United States Code, the first section of the chapter, vests in "the Courts of the United States * * * exclusive of the Courts of the several states" an eight-point jurisdiction which necessarily in the light of Article III of the Constitution applies exclusively to the Supreme Court and inferior Courts constitutionally ordained thereunder. It is apparent from such close interrelation in considering the chapter as a whole, that Courts and any Court of the United States are intended to be constitutional Courts in the historical meaning thereof. Such historical meaning and that of legislative Courts being mutually exclusive of each other, the use of the phrases "Courts of the United States" and "any Court of the United States" to mean constitutional Courts necessarily excludes legislative Courts such as Circuit Courts of the Territory which are not even remotely referred to in the entire Judicial Code.

In professing to amend the Judicial Code and in restoring the contemplated purpose of the Clayton Act, did Congress intend to go beyond the federal judicial system affected thereby and disturb the meaning, established therein, of the phrases "Courts of the United States" and "any Court of the United States" in so far as it is limited to constitutional Courts under Article III? A bare reading of section 113 (d) of the Norris-LaGuardia Act as reported in Title 29 of the United States Code suffices to show that it did not. The section reads: "When used in sections 101-115 of this title, and for the purposes of such sections—
* * * The term 'Court of the United States' means

any Court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the Courts of the District of Columbia.” In restricting the definitive phrase “any Court of the United States” by the clause “whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the Courts of the District of Columbia,” the section accomplishes two primary objectives. Both pertain to Courts of the United States. One is to eliminate for the purposes of the Act the Supreme Court, whose appellate and original jurisdiction stems from the Constitution, from the Act’s scope and the other to make certain that the Courts of the District of Columbia, whose jurisdiction is controlled by Congress, come within it. However, there is no language contained in the section which can be reasonably interpreted or judicially construed as evincing an intention to read into the phrases “Courts of the United States” and “any Court of the United States” a status of Court different from that dealt with by the related Judicial Code or destroy the identical meaning existing therein between Courts of the United States and constitutional Courts under Article III of the Constitution.

In our opinion, the nature of the spirit and reason which prompted Congress to bring by express provision the Courts of the District of Columbia within the purview of “any Court of the United States” essentially suggests a legislative attempt to rectify in effect an apparent error appearing in the latest decision of the Supreme Court of the United States on the status

of such Courts at the time the Norris-LaGuardia Act was enacted, and but for which error there would have been no necessity to define the term "Court of the United States" nor greater need to expressly include the Courts of the District of Columbia therein than to expressly exclude the Supreme Court of the United States therefrom, Congress by Act of March 3, 1901, 31 Stat. 1199 (D. C. Code [1940], Tit. 11, § 305) having deemed the Court of first instance of the District of Columbia to be a "Court of the United States." This error lay in the unmistakeable language of the Court in *Ex Parte Bakelite Corporation*, 279 U. S. 438, 73 L. ed. 789, decided three years before the Norris-LaGuardia Act was passed, that the Courts of the District of Columbia are legislative rather than constitutional Courts. Indeed, a comparable spirit and reason motivated the passage of the Act itself in disapproval of *Duplex Co. v. Deering*, 254 U. S. 443, which as the Court indicated in *United States v. Hutcheson*, *supra*, emasculated the Clayton Act, so Congress believed, by unduly restrictive judicial construction. It was not until after the Norris-LaGuardia Act became law that the Court in *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356, judicially corrected the error by designating the declaration in the *Bakelite* case to be sheer *obiter dictum* and holding that the Courts of the District of Columbia are constitutional Courts in the historic meaning under Article III of the Constitution, thereby in effect affirming the legislative correction made by Congress.

The purpose of section 10 of the Norris-LaGuardia Act (U. S. C. Tit. 29, § 110) in using the term "Court

of the United States'' is to expedite appeals from such Court to the Circuit Court of Appeals, excluding by implication any Court, such as Circuit Courts of the Territory, where review does not lie in that Appellate Court. This section does not apply literally to the Courts of the District of Columbia because review therefrom lies in the United States Court of Appeals for the District of Columbia rather than in the Circuit Court of Appeals. However, it does so substantially. This is evidenced by the effect of the holdings of the Supreme Court of the United States that the Court of first instance in the District of Columbia (now named ''The District Court of the United States for the District of Columbia'' by Act of June 25, 1936, 49 Stat. 1921, c. 804) is in effect a District Court of the United States within the same federal judicial system and that its Appellate Court, although of different name, likewise is a Circuit Court of Appeals. (*Federal Trade Comm. v. Klesner*, 274 U. S. 145, 71 L. ed. 972; *Swift & Co. v. United States*, 276 U. S. 311, 72 L. ed. 587; *Claiborne-Annapolis Ferry v. United States*, 285 U. S. 382, 76 L. ed. 808.) There is thus no difference in substance between the two parallel sets of Courts. It is therefore reasonable to assume that Congress intended the identity as that recognized by existing judicial holdings and hence intended the section to apply to the District Court of the United States for the District of Columbia with the same force as it does to District Courts of the United States.

The meaning, then, of a ''Court of the United States,'' drawn from every part of the Norris-La-

Guardia Act as well as from its caption "An Act * * * to define and limit the jurisdiction of Courts sitting in equity * * *," is interpreted to be any Court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress under Article III of the Constitution and which Court is one of first instance, sitting in an equity case involving or growing out of a labor dispute, with authority therein to issue restraining orders and injunctions reviewable in either the Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia. This interpretation is reasonable and synchronizes each portion of the Act with the others so as to give effect to every sentence, clause, phrase and word thereof. At the same time it is in harmony with the Judicial Code and portions of the Clayton Act incorporated in it, to which the Norris-LaGuardia Act relates and professes to amend. This, therefore must be taken as the legislative intent of Congress, nothing inconsistent thereto appearing in the Act. Such intent is not obscure but manifest by the language employed. Hence there is no need to seek corroborative aid from the reports of the Senate and House Committees on the Judiciary in charge of the preparation of the then proposed Norris-LaGuardia Act even though they may authoritatively supply such aid.

The position of the petitioners is briefly that Congress, having the power to define and limit the jurisdiction and authority not only of inferior constitutional Courts under Article III of the Constitution but also of inferior legislative Courts under Article IV, intended to exercise that power to the fullest ex-

tent by passing the Norris-LaGuardia Act and consequently included within its scope the Circuit Courts of the Territory. The difficulty, however, is that Congress neither expressed nor implied such an intent. In the absence thereof it cannot be presumed that Congress in cases involving labor disputes intended to supersede the local law respecting the exercise by a territorial Circuit Court of its full equity jurisdiction and the taking of appeals from its orders and decrees to the Supreme Court of the Territory. (See *Inter-Island Steam Nav. Co. v. Hawaii*, 305 U. S. 306, 82 L. ed. 189.)

In support of their position, the petitioners place great reliance upon the broadness of the public policy declared by Congress in section 2 of the Act (U. S. C. Tit. 29, § 102) and the literal application to territorial Circuit Courts of the clause in section 13 (d) (U. S. C. Tit. 29, § 113 [d]), *i. e.*, “whose jurisdiction has been or may be conferred or defined or limited by Act of Congress.” But the declaration of such policy by its language, though broadly expressive of rights of labor under the Act, does not purport to extend beyond the jurisdiction and authority of “Courts of the United States,” as defined and limited by the Act itself, nor does the clause modify anything but the comparable and definitive phrase “any Court of the United States.” It is reasonable to assume that Congress used the two phrases, “Courts of the United States” and “any Court of the United States” coextensively with the scope of the Act with respect to the Courts affected thereby and advisedly in the historical meaning of constitutional Courts, contradistinguished from legislative Courts, which those phrases have concededly

acquired by legislative use and judicial interpretation. (See *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693; *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356; *Mookini v. United States*, 303 U. S. 201, 82 L. ed. 748.) Further, Congress is presumed to have been aware of and have intended to adopt such meaning, especially when it employs in the existing and related Judicial Code the same phrases of identical import to denote Courts vested with the judicial Power of the United States by Article III of the Constitution. Thus the parts relied upon by the petitioner, consonant with the Act as a whole, conclusively in themselves and in relation to the other parts reflect the intent of Congress to affect only that great class of inferior Courts established by Congress under Article III of the Constitution. For the Supreme Court of Hawaii to construe the Act otherwise so as to make it affect any Court not belonging to that class would be judicial legislation.

The Norris-LaGuardia Act having no application to the Second Circuit Court of the Territory and that Court not being a "Court of the United States" as defined by and within the meaning thereof, the petition for writ of prohibition is dismissed and the temporary writ dissolved.

G. R. Andersen (*H. Bouslog* with him on the brief) for petitioners.

M. E. Winn (*Vitousek, Pratt & Winn* on the brief) for respondent Maui Agricultural Co., Ltd.

C. N. Tavares, Attorney General and *D. C. Lewis*, Deputy Attorney General, for respondent C. A. Wirtz, judge Circuit Court Second Circuit.

SUPREME COURT OF HAWAII

Opinion of the Court.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO): LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO): UNIT 1, LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO): JOSEPH KAHOLOKULA, SEICHI DOI, HARRIS YOSHIO NAGATA, BENJAMIN AWANA, FRANK MATSUI, GEORGE FERNANDEZ, ERNEST FERNANDEZ, CHARLES REVERA, JOHN DOE, MARY DOE, RICHARD DOE, ET AL. *v.* CABLE A. WIRTZ, AS JUDGE OF THE CIRCUIT COURT OF SECOND JUDICIAL CIRCUIT OF THE TERRITORY OF HAWAII AND MAUI AGRICULTURAL COMPANY, LIMITED.

No. 2637.

PETITION FOR REHEARING.

Submitted January 4, 1947. Decided January 23, 1947.

Kemp, C. J., Le Baron, J. and Circuit Judge
Pence in Place of Peters, J., Absent.

Per Curiam. This is a petition for rehearing and reargument of the cause relative to the Court's opinion reported on page 404 *ante*. The petition is supported by a brief of fifty-five pages.

The first ground of the petition is that "the statement of the Court in its opinion that the restraining order issued by respondent Wirtz is 'admittedly in conformity with the laws of the Territory' is in error and is prejudicial to petitioners." The statement is neither erroneous nor prejudicial. It merely refers to an admission of the attorney for the petitioners made in open Court for the purposes of argument and which concerned a matter not in issue.

Bearing in mind that the Court's opinion resolved in the negative the sole issue presented, which is whether the second circuit court of the Territory is "a court of the United States" within the meaning of the Norris-LaGuardia Act, it is readily apparent from the arguments advanced to support them that the remaining grounds of the petition rest fundamentally upon a misconception of the authoritative holding of this Court and present questions heretofore fully briefed and argued at the hearing and considered by the Court. One example of such misconception is the urging by the supporting brief of the construction in relation to the amended Clayton and Sherman Acts that Congress intended the Norris-LaGuardia Act to apply to the United States District Court for the District of Hawaii. Assuming *arguendo* without deciding that the urged construction is judicially sound, the Act's applicability under it to one legislative Court specifically would constitute an exception to the Act's inapplicability under the Court's interpretation to legislative Courts generally. More pertinent, the construction would afford corroborative aid to such interpretation with respect to the Act's inapplicability to the second circuit court of the Territory. Clearly upon the principle of *inclusio unius est exclusion alterius* an intent to include within the jurisdictional limitations, placed by the Act upon comparable constitutional Courts, the only legislative Court in the Territory (the United States District Court for the District of Hawaii) which has the same federal jurisdiction, subject to the same limitations, as constitutional District Courts, Congress having

declared that it "shall have the jurisdiction of District Courts of the United States, and shall proceed therein in the same manner as a District Court" (Or. Act § 86; 48 U.S.C.A. § 642), of itself would evidence in the absence of any manifestation to the contrary an intent to exclude therefrom the other (the second circuit court of the Territory) which has not federal but territorial jurisdiction and is not required to proceed in the same manner as a District Court of the United States.

The petition for rehearing and reargument is denied without argument.

H. Bouslog for the petitioner.

NORRIS-LA GUARDIA ACT

Section 101. Injunction prohibited except as herein provided.—No Court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act [Chapter]; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act [Chapter].

Section 102. Public policy of United States.—In the interpretation of this Act [Chapter] and in determining the jurisdiction and authority of the Courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the Courts of the United States are hereby enacted.

Section 103. Certain undertakings not enforceable by injunction.—Any undertaking or promise, such as is described in this section, or any other undertaking or promise in section 2 of this Act [§102 of this title] is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any Court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such Court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

Section 104. Grounds for injunction limited.—No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act [§103 of this title];

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any Court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act [§103 of this title.]

Section 105. Same; combinations or conspiracies.—No Court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of

the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act [§104 of this title.]

Section 106. Member of union; when not liable for acts of others.—No officer or members of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any Court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof.

Section 107. Hearing on sworn complaint; testimony; findings; notice; irreparable injury; period of restraint; undertaking.—No Court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the Court, to the effect:—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained,

but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the Court shall direct, to all known persons against whom relief is sought, and also the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if

sustained, to justify the Court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the Court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the Court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the Court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Section 108. Person violating obligation not entitled to relief.—No restraining order or injunctive

relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Section 109. Findings; specific order.—No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the Court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the Court as provided herein.

Section 110. Appeal to Circuit Court of Appeals.—Whenever any Court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the Court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the Circuit Court of Appeals for its review. Upon the filing of such record in the Circuit Court of Appeals, the appeal shall be heard and the

temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

Section 111.—Contempt; trial by jury; contempts in presence of Court.—In all cases arising under this Act [Chapter] in which a person shall be charged with contempt in a Court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: Provided, That this right shall not apply to contempts committed in the presence of the Court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the Court in respect to the writs, orders, or process of the Court.

Section 112. Same; disqualification of judge.—The defendant in any proceeding for contempt of court may file with the Court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the Court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

Section 113. What constitutes labor dispute; participants; Courts included.—When used in this Act [Chapter], and for the purpose of this Act [Chapter]—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employees or associations of employees; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a “labor dispute” (as hereinafter defined) of “persons participating or interested” therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if belief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any Court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the Courts of the District of Columbia.

Section 114. Partial invalidity.—If any provision of this Act [Chapter] or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act [Chapter] and the application of such provisions to the other persons or circumstances shall not be affected thereby.

Section 115. Repealer.—All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S
UNION (CIO), et al.;

Appellants,

vs.

CABLE A. WIRTZ, as Judge of the
Circuit Court of the Second Judicial
Circuit, Territory of Hawaii, and
MAUI AGRICULTURAL COM-
PANY, LIMITED,

Appellees.

*Upon Appeal from the Supreme Court of the
Territory of Hawaii*

ANSWERING BRIEF OF APPELLEE
Maui Agricultural Company, Limited

C. NILS TAVARES

Alexander & Baldwin Building
Honolulu, T. H.

Attorney for Appellee.

Of Counsel:

VITOUSEK, PRATT & WINN

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PAUL P. O'BRIEN.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S
UNION (CIO), et al.;

Appellants,

vs.

CABLE A. WIRTZ, as Judge of the
Circuit Court of the Second Judicial
Circuit, Territory of Hawaii, and
MAUI AGRICULTURAL COM-
PANY, LIMITED,

Appellees.

*Upon Appeal from the Supreme Court of the
Territory of Hawaii*

ANSWERING BRIEF OF APPELLEE

MAUI AGRICULTURAL COMPANY, LIMITED.

JURISDICTION

In amplification of the statement on pages 2-3 of Appellants' Opening Brief (which brief is hereinafter for brevity referred to as the "opening brief", or abbreviated as "Op. Br.") as to jurisdiction, it should be pointed out that the jurisdiction of the Supreme Court of the Territory of Hawaii is based on Section 81 of the Hawaiian Organic Act (31 Stat. 157, 48 USCA 631), and sections 6 and 83 of that Act (31 Stat. 142, 157, 48 USCA 496 and 635) which also continued laws of Hawaii previously in force subject to

modification by the Legislature or Congress, and Revised Laws of Hawaii 1945, sections 9604 (giving the Supreme Court of the Territory original jurisdiction in questions arising under writs of prohibition directed to circuit courts or to circuit judges) 9605 (amplifying that power), and 10270-10278 (relating to writs of prohibition), all of which are printed in the Appendix, as Appendix A.

STATUTES INVOLVED

The opening brief p. 3, seems to imply that the Norris-LaGuardia Act is the only federal statute involved. While this is primarily the statute involved, the question of construction also involves other federal acts, which will be referred to in this answering brief. For brevity, the Norris-LaGuardia Act will be sometimes hereinafter referred to as the "NLGA".

QUESTION PRESENTED

The question is not quite as broad as appears to be implied in the opening brief, p. 3. Actually, the only question presented in this case is:

Is a circuit court of the Territory of Hawaii a "court of the United States" as defined by and within the meaning of the Norris-LaGuardia Act, and are the provisions of that Act applicable to such a circuit court?

STATEMENT OF THE CASE

The statement of the case on pages 4 to 7 of the opening brief is substantially correct, but requires amplification from the standpoint of appellees. Before issuing the temporary restraining order complained of in the petition for a perpetual writ of prohibition, the appellee, Circuit Judge Wirtz, held an ex parte hearing in which numerous affidavits were presented in evidence and testimony was adduced, which, together with the allegations of the sworn petition

for injunction, alleged and showed, among other things, that the respondents, their agents, servants and employees, and others in active concert and participation with them were congregating in mobs and as picketers at times in excess of 350 persons near or upon plantation property in the immediate vicinity of the entrances to the mill and other premises of the petitioner plantation in a disorderly and unlawful manner, and were wilfully and maliciously blocking the entrances to petitioner's premises; that they were denying to the employees of petitioner lawful entry upon its premises; that they were using boisterous, offensive, disorderly, abusive and insulting language directed at petitioner's employees and were threatening them with serious injury to their persons if they attempted to proceed to work or perform work for petitioner; that they were threatening and had committed numerous breaches of the peace; that they had gathered in large numbers around homes of petitioner's employees, using threatening and intimidating language toward them concerning the safety of their families, and had caused disturbances by undue noise and unseemly acts so as to annoy, disturb, and be offensive to others; and that they had unlawfully picketed many roads and streets throughout plantation property, stopping and intimidating persons seeking ingress on such roads and streets; all of which had obstructed ingress to and egress from petitioner's mill and other plantation premises, and intimidated petitioner's employees desiring to enter or proceed in and from said premises and prevented them from working for petitioner. (R. 25-28; 80-93).

The procedure followed by Judge Wirtz was "admittedly in conformity with the laws of the Territory". It was not in strict conformity with the provisions of the NLGA, which law was held by the territorial Supreme Court to be inapplicable. (Op. of Terr. Sup. Ct., R. 58; on rehearing, R. 77).

The statement on page 7 of the opening brief to the effect that the Supreme Court of the Territory held, among other

things "and that the provisions of the Norris-LaGuardia Act are not applicable in the Territory of Hawaii", is not correct. It is very clear from the whole opinion, as well as from the opinion on rehearing (R. 77-78) that the sole question actually decided was: "Is a Circuit Court of the Territory a 'court of the United States' as defined by and within the meaning of the Norris-LaGuardia Act so as to render its provisions applicable" "to the second circuit court of the Territory". (R. 58, 70). The importance of this inaccuracy will be developed later in this brief.

THE ASSIGNMENTS OF ERROR

It is submitted that the only assignment of error entitled to consideration by this court, and the only one within the pleadings and record, is assignment no. 4 (R. 6) reading as follows:

Assignment No. 4. The Court erred in its conclusion that a circuit court of the Territory is not a "court of the United States" as defined by and within the meaning of the Norris-LaGuardia Act.

Assignment No. 10, (R. 7) claiming that "The Court erred in holding that the defendant Cable A. Wirtz as Judge of the Circuit Court of the Second Judicial Circuit had jurisdiction to issue a temporary restraining order in a case growing out of a labor dispute", erroneously assumes that the pleadings assail the power of a circuit judge of the Territory to issue a temporary restraining order in any case growing out of a labor dispute, whereas the pleadings only assail the exercise of the power in a manner not in compliance with the procedural requirements of the NLGA.

Assignments Nos. 1, 2, 3 and 11 (R. 5, 7) are mere general statements that the Supreme Court of the Territory erred generally in entering its opinion and decision, its judgment, and its opinion and decision denying the petition for rehearing.

Assignment No. 5 (R. 6), claiming that the lower court erred in its alleged conclusion that Congress manifested an intention to and did exclude from the coverage of the NLGA legislative courts of the United States, is immaterial, because we shall show that the only thing the court below really held ultimately was that a circuit court of the Territory was not a "court of the United States" within the meaning of the NLGA.

Assignment No. 6 (R. 6), assumes, unjustifiedly we submit, in view of the only point really decided by the court below, that the lower court failed to give to the NLGA "the same scope and coverage as the Clayton and Sherman Acts which the Norris-LaGuardia Act amends". This is not true, as this brief will demonstrate.

Likewise, assignments No. 7, 8 and 9 (R. 6), are merely objections to alleged reasons given by the lower court for its decision on the only real point in issue, and become immaterial if, as we believe is demonstrated by this brief, the lower court's decision on that sole point is correct. The reasoning used by the lower court in reaching its conclusion, while correct, in any event is immaterial.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of the Territory (R. 58-70, Rehearing denied, R. 77-78) was correct on the only point necessary to be, and actually decided, which was that a circuit court of the Territory of Hawaii is not a "court of the United States" within the meaning of the Norris-LaGuardia Act, and that therefore that Act was not applicable to such court, and the circuit court of the second circuit of the Territory had jurisdiction to proceed as it did, in granting a temporary restraining order without complying with the procedural requirements of the Norris-LaGuardia Act. The following is an outline and summary of the argument in support of this general proposition.

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| I. The territorial legislature and the territorial courts, as distinguished from the Federal or United States District Court for Hawaii, were given by Congress under the Hawaiian Organic Act practically the same autonomy as that of a State with respect to jurisdiction and procedure, and it would require clear and unmitakeable evidence of a contrary congressional intent in any subsequent Federal act to justify a holding restricting such autonomy | 10 |
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ARGUMENT

The decision of the Court below was correct on the only point necessary to be, and actually, decided, which was that a Circuit Court of the Territory of Hawaii is not a "Court of the United States" within the meaning of the Norris-LaGuardia Act, and that therefore that Act was not applicable to such Court, and the Circuit Court of the Second Circuit of the Territory had jurisdiction to proceed as it did, in granting a temporary restraining order without complying with the procedural requirements of the Norris-LaGuardia Act.

We shall proceed to demonstrate, both by ordinary principles of statutory construction applied to the language of the Norris-LaGuardia Act itself, and by the history of the act, that a circuit court of the Territory is not a "court of the United States" within the meaning and intent of that act.

I.

The Territorial Legislature and the Territorial Courts as distinguished from the Federal or United States District Court for Hawaii, were given by Congress under the Hawaiian Organic Act practically the same autonomy as that of a state with respect to jurisdiction and procedure, and it would require clear and unmistakeable evidence of a contrary Congressional intent in any subsequent Federal Act to justify a holding restricting such autonomy.

The appellants contend that the 72nd Congress in restricting the jurisdiction and procedure of any "court of the United States" to issue injunctions in labor disputes intended to, and did, exercise the power, which admittedly it possessed, to limit and regulate the jurisdiction and procedure of Territorial circuit courts. As to this contention, this much may be said: If this was the intent of Congress, then it is the first and only instance since the organization of the Territory under the Hawaiian Organic Act that Congress has chosen to exercise its rights to restrict the general jurisdiction or authority of our Territorial courts, as that general jurisdiction was conferred or authorized to be conferred by the original Organic Act. To be sure, Congress has, from time to time, in an act of special application to the Territory of Hawaii, *expressly recognized* or *enlarged* that jurisdiction, as for instance: (a) when, by section 209 of the Hawaiian Homes Commission Act, as amended (48 USCA 703, as am.), Congress authorized the Commission to appoint guardians of minors "subject to the approval of the *court of proper jurisdiction*" (emphasis added); and (b) when, by section 217 of the same Act (48 USCA 711), it empowered the Commission, as to defaulting lessees, to

(1) bring an action of ejectment or other appropriate proceeding, or (2) invoke the aid of the circuit court of the Territory for the judicial circuit in which the tract . . . is situated. Such court may thereupon

order the lessee . . . to comply with the order of the commission. Any failure to obey the order of the court may be punished by it *as contempt thereof*. (Emphasis added.)

These instances, cited so triumphantly in the opening brief, pp. 22-3, were not only amendments or original portions of a *special act peculiarly local to the Territory*, being designed for the rehabilitation of native Hawaiians, but they actually prove that Congress in 1921 (when the original Hawaiian Homes Commission Act was passed; 42 Stat. 108, 113), and again in 1937 (when the amendment as to guardianship was passed; 50 Stat. 504-5), still recognized the *autonomous equity and probate jurisdiction* of the local Territorial circuit courts, including their *power to punish for contempts* under local *Territorial laws*, concerning which more will be said later.

Actually Congress, throughout the history of the Territory, has consistently taken particular care to leave to the Territorial legislature and the Territorial courts the question as to when and upon what evidence our courts of law and courts of equity may exercise their powers and the procedure of those courts.

1. History of Hawaiian Organic Act Indicates Unmistakable Congressional Intent to Grant Such Autonomy to Territorial Legislature and Courts, and Entirely Separate Jurisdiction and Procedure of Federal Court in Hawaii from that of Local Territorial Courts.

In order to grasp the full significance of appellants' contention that Congress, by the NLGA, intended to change all this autonomy and limit both the Territorial legislature and the Territorial courts in their previously enjoyed powers with respect to local equity jurisdiction and procedure, and in order to evaluate this contention in its proper light, it is essential to understand just what those local powers were before the NLGA was enacted.

The most significant thing which strikes us at the outset is that Hawaii is unique in the history of all Territories and possessions of the United States in the *autonomy*, practically equal to that of a State, granted to it at the very outset by Congress, in every department of government. In this respect only the original thirteen colonies and Texas came into the union with more autonomy.

Because the appellants' contentions, if sustained, not only would affect the local legislative and judicial control over equity procedure, but also would reverse a forty-seven year trend of local autonomy toward the ultimate goal of complete self-government through Statehood in this Territory, we ask this court to bear with us in a rather minute recapitulation of Territorial history, of most of which we know this court is fully aware.

The Hawaiian Islands were annexed by a Joint Resolution of Congress (Res. No. 55), known as the Newlands Resolution, 30 Stat. 750, enacted July 7, 1898, which, among other things, not only uniquely recognized Hawaii's claim to its own public lands by rendering inapplicable to them the existing laws of the United States relative to public lands and guaranteeing that the revenues therefrom should forever be used for the benefit of Hawaii's people (a distinction that only the State of Texas can claim), but also continued in effect the "municipal legislation of the Hawaiian Islands", with certain minor exceptions, until Congress "shall otherwise determine", and created a commission of five persons to "recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper".

This Commission, composed of two senators and one representative, of Congress, and two local citizens of Hawaii, prepared and submitted to Congress a comprehensive printed report setting forth their findings and recommendations, including a draft of a proposed organic act for the Territory, which was finally enacted with minor amend-

ments. (See HAWAIIAN COMMISSION MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE REPORT OF THE HAWAIIAN COMMISSION, APPOINTED IN PURSUANCE OF THE "JOINT RESOLUTION TO PROVIDE FOR ANNEXING THE HAWAIIAN ISLANDS TO THE UNITED STATES", APPROVED JULY 7, 1898; TOGETHER WITH A COPY OF THE CIVIL AND PENAL LAWS OF HAWAII [Document No. 16, 55th Cong., 3d. Sess.]). This report is most significant because its recommendations as to the judiciary with the exception of the proposals to have the Territorial judges appointed by the local governor with the approval of the local senate, and to give the Federal judge life tenure, were followed by Congress in finally passing the Organic Act.

At pages 17-18 of this report the commission said (emphasis added) :

... the commission deem it proper to say that the people of Hawaii are capable of self-government, and have proven this by the establishment of the Republic of Hawaii and the adoption of *a constitution and code of laws which will compare favorably with those of any other government, and under such constitution and laws have maintained a stable government for several years worthy of a free people.* The people of those islands are more or less familiar with the institutions and laws of the United States, while the laws of the little Republic are largely taken from the laws of this country.

The bill proposed by the Commission is set forth in the report, and the portions on the judiciary appear on pages 38-40 thereof, being secs. 84-90 of the proposed bill, and disclose, with minor variations, language practically identical with the Organic Act as finally passed. The report of a sub-committee of this Commission, composed of Sen. Morgan and W. F. Frear, then Chief Justice of the Hawaiian Supreme Court, on the judiciary, is included on pages 162-4 of the Commission's report, and adopted by the Com-

mission. This particular portion of the report (which is printed in the Appendix as Appendix B) is adopted and quoted verbatim as its Report No. 305, at page 19, by the House Committee on Judiciary on H.R. 2972 (House Reports, Vol. 2, Nos. 246-486, Miscellaneous, 56th Cong., 1st Sess., 1899-1900, Sr. No. 4022), which bill was later incorporated by the House into S. 222, which was finally enacted as the Hawaiian Organic Act (see House Report No. 549 on S. 222; House Reports, Vol. 3, Nos. 487-807, Miscellaneous, 56th Cong., 1st Sess., 1899-1900, Sr. No. 4023). This Report No. 305, at page 21, then continues:

To this report may be added that the foundation of the legal system of the islands is the common law of England, and that the penal laws and practice is codified, and there are no penal offenses except those enumerated in the code. The civil law in its practice and procedure is partially codified.

In view of the foregoing report it must be considered wise and safe to provide for the organization of the Territorial courts of the Territory of Hawaii by substantially continuing them as now existing under the Republic of Hawaii, and this has been done in the present bill. The reasons also stated in the report for the separation of Federal and Territorial jurisdiction and the creation of a new judicial district of the United States for the islands and the establishment of a district court sufficiently explain and sustain the provisions for such a court in section 87 of the bill. (Emphasis added.)

In the debates on the bill, S. 222, which became the Organic Act, Sen. Cullom, one of the commissioners who prepared the bill and one of its chief proponents, even more emphatically pointed out that the theory and purpose of the bill was to set up *separate court systems* in Hawaii, one purely Federal, and one purely Territorial or local, *just as in a State*. Senator Morgan arguing in favor of both separation of Federal and Territorial courts and the appointment of

local judges by the overnorn of the Territory, also reiterated this view. See excerpts from or references to the views of Senators Cullom, Morgan and other members of Congress to this effect in Appendix D-1, pp. xli-xlv.

It will thus be seen that, at the very creation by Congress of the 'Territorial government, Congress wished *no part of Federal jurisdiction or procedural provisions to be applicable to the Territorial government and courts*, but wished to leave them *entirely autonomous, just as in a State*. Examining the Hawaiian Organic Act, as passed by Congress we find that these views were fully carried out as to separation of the Federal and Territorial judicial systems.

2. Hawaiian Organic Act Provisions Indicate Clearly Congressional Intent to Grant, and Actually Provide For, Such Autonomy and Absolute Separation of Jurisdiction and Procedure of Federal Court in Hawaii from that of Local Territorial Courts.

Thus sec. 1 of the Organic Act (31 Stat. 141, 48 U.S.C.A. 493) defines "the laws of Hawaii" to mean the constitution and laws of the Republic of Hawaii in force at the time of the annexation, and refers to certain codifications of the civil and penal laws of Hawaii, which, as we have seen *ante*, p. 13, were printed and made a part of the report of the Hawaiian commission that drafted the Act, and which indicated the existence of a complete system of laws in a well-ordered local government.

By section 5 of the same act (31 Stat. 141, 48 U.S.C.A. 495), as later amended in 1910 (36 Stat. 443), the constitution and all laws of the United States "not locally inapplicable" were extended to Hawaii, but practically all of the general laws of the United States *relating to territories* were expressly made inapplicable to Hawaii. Thus Sections 1841-1891, and 1910 and 1912 of the U.S. Revised Statutes were made inapplicable to Hawaii. These sections included provisions relating to election of justices of the peace (§ 1856),

supreme court (§ 1864), judicial districts (§ 1865), limitations on jurisdiction of justices of the peace (§ 1867), *chancery* and common law *jurisdiction* of supreme and district courts (§ 1868), appeal and error (§ 1869), federal jurisdiction of district courts (§ 1910), power of supreme and district courts to issue writs of habeas corpus (§ 1912), and many other general provisions as to organization, personnel, etc., of territorial courts. These exemptions serve only to emphasize more fully the *complete local autonomy intended by Congress* for the territorial judicial system, as opposed to the purely Federal U. S. District Court for Hawaii hereinafter mentioned.

In reporting on the bill (S. 3360) which amended section 5 of the Organic Act in 1910 (36 Stat. 443), the Senate Committee on Pacific Islands and Puerto Rico says, among other things:

. . . The main object of the amendment is to remove the uncertainty, which has at times caused trouble, as to whether the provisions of the organic act are exclusive in regard to the general subjects to which they relate, or whether other provisions of the federal laws, upon the same general subjects, but enacted with special reference to other Territories, though in general terms, also apply to Hawaii.

It is believed both that the subjects covered by the laws excepted in this proviso are sufficiently covered by the organic act and that the excepted laws do not now, as a matter of construction, apply to Hawaii. But the uncertainty should be removed. . . . Senate Rept. No. 126, 61st Cong., 2d. Sess.

To the same effect is the report of the House Committee on Territories, in Report No. 910, same session.

In the debates on this amendment in 1910, Sen. Depew, the principal proponent of the bill, said:

It is a tribute, and a remarkable one, to the self-governing powers of the Hawaiian people that they should have been granted in the organic act *conditions*

of self-government which have not been given to any other of our possessions or territories,

quoting the report of the Commission which drafted the Organic Act, cited ante, p. 13. (45 Cong. Rec. 2292).

By section 6 of the Organic Act (48 U.S.C.A. 496) it was provided (emphasis added) :

That the *laws of Hawaii* not inconsistent with the Constitution or *laws of the United States* or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States.

Congress here strictly differentiated between *laws of Hawaii*, i.e. of the present Territory, and *laws of the United States*. This is of importance in considering the meaning and intent of sec. 20 of the Clayton Act (29 U.S.C.A. 52) which provides that certain exempted labor activities shall not "be considered or held to be violations of any *law of the United States*." (Emphasis added.) We will discuss this further later, post, pp. 84-90.

The Organic Act fully recognized and perpetuated the separate autonomy of the Territorial legislature and courts. Section 10 of that Act (48 U.S.C.A. 501) provided:

That all rights of action, *suits at law* and *in equity*, prosecutions . . . existing prior to the taking effect of this Act shall continue to be as effectual as if this Act had not been passed; . . . All offenses which by statute then in force were punishable as offenses against the Republic of Hawaii shall be punishable as offenses against the government of the Territory of Hawaii, unless such statute is inconsistent with this Act, or shall be repealed or changed by law . . . *all actions at law, suits in equity*, and other proceedings then pending . . . shall be carried on to final judgment and execution in the *corresponding courts of the Territory of Hawaii*. . . (Emphasis added.)

Section 11 of the Organic Act (48 U.S.C.A. 505) provides for the style of process in the "Territorial courts" to run in

the name of "The Territory of Hawaii". Section 81 of the Organic Act (48 U.S.C.A. 631) vests "*the judicial power of the Territory*" "in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish," and provides that:

... until the *legislature* shall otherwise provide, the *laws of Hawaii* heretofore in force concerning the *several courts* and their *jurisdiction and procedure* shall continue in force except as herein otherwise provided. (Emphasis added.)

Section 82 (48 U.S.C.A. 632) provides for the Supreme Court of the Territory, and section 83 (48 U.S.C.A. 635) reiterates:

That the *laws of Hawaii* relative to the judicial department, including civil and criminal procedure, except as amended by this Act, are continued in force, *subject to modification by Congress, or the legislature*. . . .

Finally, by section 55 of the Organic Act (48 U.S.C.A. 562), Congress provided:

That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable.

Although in the foregoing sections and certain others, such as section 84 (48 U.S.C.A. 636), Congress (as would be natural in an organic law for the organization of a territorial government, just as it would in a constitution for a state government) laid down certain general basic restrictions on the general powers of the legislature and on the jurisdiction and procedure of territorial courts, the general pattern of the local territorial judiciary and the power of the legislature to regulate its jurisdiction and procedure remained practically intact, the same essentially as in the case of a state judiciary.

These local "laws of Hawaii" relating to the judiciary, which Congress so carefully left intact, the same practically as in the case of a state, embraced an *entire code of civil laws*, and an *entire code of penal laws* (printed as part of the Hawaiian Commission's report to Congress, as stated ante p. 13), of which only a relatively few sections were expressly repealed or amended by sections 7 (omitted from Title 48; see note to § 496) and 83 (48 U.S.C.A. 635) of the Organic Act. A brief summary of the most important of these laws is given in Appendix D-2, p. xlv-xlvi.

Congress, on the other hand, in the Organic Act, after providing for the *Territorial* courts under the heading "CHAPTER IV. THE JUDICIARY" (See 31 Stat. 157), obviously referring to the *Territorial* judiciary, just as in the previous titles such a "CHAPTER II. THE LEGISLATURE" (31 Stat. 144), and "CHAPTER 3. THE EXECUTIVE" (31 Stat. 153) it referred to the *Territorial* legislature and *Territorial* executive, then expressly differentiated between such *Territorial* officers and *Federal* officers, by the title "CHAPTER 5. UNITED STATES OFFICERS" (31 Stat. 158), under which Congress then provided for the Delegate to Congress and various *Federal* officers, and under the subtitle "FEDERAL COURT" (31 Stat. 158), provided, in section 86 of the Organic Act (48 U.S.C.A. 641-645) for a Federal district court (See *U. S. v. Bower* (1914) 4 U.S.D.C. Haw. 466-467). That section provides, among other things:

... Said court *shall have*, in addition to the *ordinary jurisdiction of district courts of the United States*, jurisdiction of all cases cognizable in a *circuit court of the United States*, and *shall proceed therein in the same manner as a circuit court*; and said judge, district attorney, and marshal shall have and exercise in the Territory of Hawaii *all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district and circuit courts of the United States*. Writs of error and appeals from said district court shall be had and allowed to the circuit court of

appeals in the ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The *laws of the United States* relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. . . . (31 Stat. 158).

We shall discuss section 86 further in connection with the proper construction of the Norris-LaGuardia and Clayton Acts, but it suffices here to point out that in this section alone, Congress has differentiated between "*courts of the United States*," meaning the U. S. District court for Hawaii, and "*courts of the Territory*," which we have already discussed, just as it has differentiated between "*laws of the United States*" mentioned in section 86 and in sections 5 and 6, and "*laws of Hawaii*," meaning laws of the Territory, mentioned in sections 1, 6 and 81 of the Organic Act, hereinabove quoted (see further discussion of this point post, pp. 84-90) and, further, Congress has expressly provided that the relationship between the two kinds of courts, Federal and Territorial, shall be the *same as that between Federal courts and State courts in a State*.

3. The Decisions of Both the Territorial and the Federal Courts Have Consistently Recognized and Given Full Effect to this Congressional Mandate and Intent to Grant Autonomy to the Local Legislature and Territorial Courts as to Jurisdiction and Procedure and to Entirely Separate the Jurisdiction and Procedure of the Federal Court in Hawaii from that of the Territorial Courts.

This clear mandate of Congress as to the practical autonomy of the Territorial legislature and courts, has been

recognized and given effect in many ways by the Territorial courts, the Federal or United States District Court for Hawaii, and the Federal appellate courts.

Thus, it has been held that the powers of the territorial legislature are practically those of a State under the grant by section 55 of the Organic Act (31 Stat. 150, 48 U.S.C.A. 562), of legislative power extending "to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable."

By the Organic Act Congress organized for the Territory a sovereign government, having immunity from suit without its consent; such a government is itself "the fountain from which rights ordinarily flow." *Kawananakoa v. Polyblank*, (1907) 205 U.S. 349, 51 L. ed. 834.

In *Puerto Rico v. Shell Co.* (1937) 302 U.S. 253, 260-263, 82 L. ed. 235, 242-3, the court held provisions of the Puerto Rican Organic Act similar to ours to be "as broad and comprehensive as language could make it," and that the aim of such acts was to grant "full power of local self-determination, with an autonomy similar to that of the states. . . ."

See, also, *In re Craig* (1911) 20 Haw. 483, 490, *Yerian v. Territory of Hawaii* (9 Cir. 1942) 130 F. 2d 786, 788, as to *power of taxation* and *police power*.

This legislative autonomy extends to the courts. Referring to the Organic Act the United States Attorney General has said (emphasis added) :

Indeed, it would be difficult to frame language more clearly subjecting to legislative change *the whole matter* of "the *laws of Hawaii* heretofore in force *concerning courts and their jurisdiction and procedure*" and "relative to the judicial department." . . .

23 Ops. Attys. Gen. U.S. 539, 543.

Likewise, it has been held that the *jurisdiction and powers of Territorial courts are practically those of a State court*,

that the relationship between the Territorial courts on the one hand and the Federal including the U. S. District Court in Hawaii, is substantially the same as that between State courts and Federal courts in a State, and that in these respects the purely Territorial judicial system was unique in the history of Territories. See *Hind v. Wilder's S.S. Co.* (1900) 13 Haw. 174, 182; *Wilder's S.S. Co. v. Hind* (9 Cir. 1901) 108 F. 113, 114-116; *U. S. v. Bower* (1914) 4 U.S.D.C. Haw. 466, 467.

For decisions holding that the Federal rule against interference by habeas corpus in Federal courts with the proceedings of State courts is equally applicable to the Territory, see, also:

In re Curran (1916) 4 U.S.D.C. Haw 730, 738-9
Soga v. Jarrett (1910) 3 U.S.D.C. Haw 502, 506-509
In re Atcherley (1909) 3 U.S.D.C. Haw. 404, 421
In re Marshall (1900) 1 U.S.D.C. Haw. 34

See also *Yeung v. Territory of Hawaii* (9 Cir., 1942) 132 F. 2d. 374, 378 as to the complete separation of Territorial and Federal courts.

Furthermore, the Federal appellate courts, have particularly with respect to a Territory having a dual system of courts (Territorial and Federal) like Hawaii's, emphatically adopted the rule that the decisions of such Territorial courts on matters of local law or local concern are generally controlling on the Federal appellate courts.

Waialua Agricultural Co. v. Christian
 (1938) 305 U. S. 91, 106-109,
 83 L. ed. 60, 70-72.

On the other hand, this court has very recently had occasion to emphasize the difference between the judicial system of Alaska, which still has but one set of courts with both Federal and local jurisdiction, and that of a Territory like Hawaii which has entirely separate systems, again empha-

sizing the autonomy of the Hawaii Territorial courts. Thus, in *Carscadden v. Territory of Alaska* (9 Cir., 1939) 105 F. 2d. 377, it was held that in reviewing decisions of the District Court of Alaska the Circuit Court of Appeals exercises independent judgment with respect to general, local and federal questions and review of the decision of such a court on general or local law is not limited to cases of manifest error, distinguishing the *Waialua* case, *supra*, and other similar cases.

In the face of this overwhelming evidence of the *consistent intent of Congress*, during the forty-seven years of this Territory's existence, expressed unmistakeably in the Hawaiian Organic Act, irrefutably corroborated by the history of that legislation, and consistently followed by the courts both Territorial and Federal, to grant to the Territorial legislature and Territorial courts the autonomous control over jurisdiction and procedure exercised by State legislatures and State courts, appellants ask this court to *imply*, from an expression of general policy in a statute (the NLGA) whose operative terms are obviously aimed at and fit only the purely Federal courts (as we shall hereafter demonstrate), a contrary intent to overturn the policies of half a century and by *implication* to amend the local laws of the Territory, hereinabove mentioned, relating to the jurisdiction and procedure of the Territorial courts both of law and of equity.

II.

To hold that the Norris-LaGuardia Act has reversed the policy of local autonomy for Territorial Courts as to jurisdiction and procedure, and entire separation of Federal from Territorial jurisdiction and procedure, consistently pursued by Congress for almost half a century would require clear and unmistakeable evidence of intent so to do in such act.

That Congress itself^{*} has customarily recognized this rule has been clearly pointed out by the Supreme Court:

It has generally been customary for Congress, in extending legislation to the territories and "possessions" of the United States, to expressly mention them as included within the purview of the act. . . .

Munoz v. Porto Rico Ry. Light & Power Co.
(1 Cir. 1936) 83 F. 2d. 262, 266 (Cert. den.
80 L. ed. 1408, 298 U. S. 689).

The very nature and purpose of a territorial government call for the strict application of such a rule against implied amendment or repeal of local law, both statutory and non-statutory, of a territory. The theory upon which territories have been organized "has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress"; these powers are "apparently as plenary as" those "of the legislature of a State", the grants, such as those under sec. 55 of our Organic Act, being "as broad and comprehensive as language could make it"; and "Nothing is expressed in these acts or . . . in any other federal act which suggests a congressional intent to limit the exercise of the power of local legislation to those subjects in respect of which there is an absence of explicit legislation by Congress"; and there is "nothing in the nature of the power or in the consequences likely to ensue from the duplicate exercise of it which requires an implication to that effect." *Puerto Rico v. Shell Co.* (1937) 302 U. S. 253, 260-263, 82 L. ed. 235, 242-3.

. . . "an intention to supersede the local law (of a Territory) is not to be presumed, unless clearly expressed."

Inter-Island Steam Navigation Company v. Hawaii
(1938) 305 U. S. 306, 312, 83 L. ed. 189, 194.

"A law is not to be construed as impliedly repealing a prior law unless no other reasonable construction can

be applied.” United States v. Jackson, 302 U. S. 628, 631. . . . 82 L. Ed. 488.

Quoted in *Yeung v. Territory*,
(9 Cir., 1942) 132 F. 2d. 374, 378.

This rule was quoted in the last mentioned case in connection with a holding that numerous amendments of the Hawaiian Organic Act as to appeals had not amended by implication the provisions of section 86 as to removal, etc., between Territorial Circuit Courts and the U. S. District Court for Hawaii.

In this connection, it should be noted that under section 5 of the Hawaiian Organic Act which provides that:

“ . . . all the laws of the United States . . . which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States,”

the NLGA is to have, in the Territory of Hawaii, the same force and effect *as elsewhere in the United States*, that is to say, Section 5 itself provides that a federal law is *not* to have a *greater effect* in the Territory of Hawaii than elsewhere in the United States, unless specifically provided in the law itself, which is but another way of stating the rule that repeals of local laws by implication are not favored.

Appellants themselves recognize the force of this rule against implied amendment or repeal of *local* law, for they seek to avoid the rule by contending that their construction of the NLGA would not effect any change in the local law. See statement (Op. Br. 33) reading:

There is no statute in the Territory relating to the jurisdiction of Circuit Courts sitting in equity in cases involving or growing out of labor disputes. If, prior to the passage of the Act, Circuit Courts of the Territory had any power to issue injunctions in labor disputes, such power existed only by virtue of Section 81 of the Organic Act, 48 U.S.C. 631, and Sections 12401 and 12402 conferring a general power of equity on Circuit

Courts. There is no *conflict between a territorial act regulating the issuance of injunctions in labor disputes and the Norris-LaGuardia Act*. Hence, clearly within the rule laid down in the *Page* case no local law is being displaced or superseded. (Emphasis added.)

This statement ignores self-evident facts. There are numerous sections, both of the Organic Act and of the Territorial statutes which, by their general application to local equity courts and their jurisdiction and procedure, apply to injunctions in labor disputes. The more important of these sections are compiled and discussed in Appendix D-3, pp. xlvii-l, and the local statutory sections so referred to are quoted in Appendix A, pp. i-xvi.

... Before it may be said that a law passed by the territorial legislature is inconsistent with a law of the United States, it must appear that there exists a "substantial conflict between the pertinent provisions of the two statutes." *Puerto Rico v. Shell Co.*, 302 U. S. 253, 263.

Auto Rental Co. v. Lee
(1939) 35 Haw. 77, 85.

The truth is that the NLGA does not impliedly amend or repeal the territorial laws above mentioned, because it applies or is pertinent to an *entirely different area of legislation*—the Federal courts—from that of such local laws, which is the territorial courts, and for *that reason* there is no conflict between them as hereinafter demonstrated.

III.

The Norris-LaGuardia Act contains no indication of a Congressional intent to overthrow the local autonomy heretofore given by the Organic Act to the Territorial legislature and Territorial Circuit Courts over their equity or other jurisdiction and procedure or to destroy the separation of Federal and Territorial judicial jurisdiction and

procedure heretofore maintained. On the contrary, both the act and its history give every indication that Circuit Courts were not intended to be included.

Let us examine the Norris-LaGuardia Act for evidence, if any, of that *clear expression* of intent necessary to accomplish the superseding of local law contended for by appellants.

1. The Norris-LaGuardia Act is Expressly Limited in Its Operation to Courts of the United States.

The Norris-LaGuardia Act (Act of Mar. 23, 1932, 47 Stat. 70, 29 U.S.C.A. §§ 101-115, quoted in Appendix of Op. Br., pp. xvi-xxvi) places certain limitations on the right of any "court of the United States" to issue injunctions in labor disputes, and by section 13 (d) thereof (29 U.S.C.A. 113 (d)), defines "court of the United States" as follows:

(d) The term "court of the United States" means any *court of the United States* whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, *including the courts of the District of Columbia*. (Emphasis added.)

If the italicized portion of the definition had been omitted and the definition had read:

The term "court of the United States" means any court whose jurisdiction has been or may be conferred or defined or limited by Act of Congress,"

it would include all Territorial courts, whether Federal or purely local like our circuit courts, as Congress admittedly has the power to confer, define and limit the jurisdiction of all Territorial courts. But the italicized words were not omitted. They were inserted for a purpose. They can not be ignored, or read out of the act. More will be said on this item later in this brief.

There are other indications in the act itself besides its title (discussed post, pp. 44-47), which show that purely Federal courts, as distinguished from territorial courts with purely local jurisdiction like our circuit courts, were the only ones intended to be affected by that statute.

Thus section 1 of the Act (29 U.S.C.A. 101) provides that

No *Court of the United States, as herein defined*, shall have jurisdiction to issue any restraining order . . . except in a strict conformity with this Act; nor shall any *such restraining order* . . . be issued contrary to the public policy declared in this Act. (Emphasis added.)

Thus, any reference in the act to a "court of the United States" is limited to such a court as defined in the act. And, the restraining order, etc., which is forbidden to be issued except in conformity with that act is "*such restraining order*"—that is, a restraining order issued by a court of the United States as defined in the act.

Section 2 of the act (29 U.S.C.A. 102) defines the public policy of the United States "In the interpretation of this Act *and in determining the jurisdiction and authority of the courts of the United States,*" and, ends up by saying:

. . . *therefore*, the following definitions of, and limitations upon, the jurisdiction and authority of the *courts of the United States* are hereby enacted. (Emphasis added.)

Here again, it is clear that the act is aimed at limiting the jurisdiction and authority of the *courts of the United States*, as the means of accomplishing the declared public policy.

Similarly, section 3 of the act (29 U.S.C.A. 103) declares yellow dog contracts to be contrary to the public policy of the United States, and, as the sole medium of giving effect to that policy, again provides that such contracts "shall not be enforceable in any *court of the United States* and shall

not afford any basis for the granting of legal or equitable relief *by any such court.*" (Emphasis added.)

Likewise, throughout the entire act, all restrictions or limitations on jurisdiction are tied to proceedings in a "*court of the United States*," indicating that, whatever the motive and objective of Congress might be, the act is still essentially a procedural one, applicable to the purely Federal courts.

This follows from the fact that the term "*court of the United States*" had a *well defined meaning* prior to the passage of the NLGA, which excluded territorial circuit courts, and under such circumstances the 72nd Congress would be *presumed to have adopted that meaning* when it used the phrase. 59 C. J. 1008-1012, § 600; 11 Ency. of U. S. Sup. Ct. Repts., pp. 137-138, "*Judicial Construction.*"

See, also, *Munoz v. Porto Rico Ry. Light & Power Co.*, (1936) 83 F. 2d. 262, 266, holding that:

"In adopting the language used in an earlier act Congress must be considered to have adopted also the construction given by this Court to such language and made a part of the enactment." *Hecht v. Malley*, 265 U. S. 144 . . . "It is a well settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body." *Kepner v. United States*, 195 U. S. 100. . . .

2. The Term "Court of the United States" Had a Well Defined Meaning Prior to Passage of the Norris-LaGuardia Act.

Section 1 of Article III of the Constitution of the United States provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Section 2 of the same article defines the jurisdiction of such courts but does not allocate the jurisdiction to any particular court, save in one particular, that being in the case of the Supreme Court.

The section provides that:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.

Congress can not, of course, by legislation limit this jurisdiction or in any way affect it. For example Congress could not, even had it so desired, make the Norris-LaGuardia Act applicable to a case in the United States Supreme Court wherein a State applied for an injunction in a labor dispute.

Pursuant to the power and authority granted to it by Article III Congress has created certain inferior courts, they being, the Circuit Court of Appeals, the Circuit Court (later abolished) and the District Court. These courts, along with the Supreme Court are known as "Courts of the United States." Sometimes they are referred to as "constitutional courts" to distinguish them from "legislative courts" which, although created by Congress, were not brought into being by virtue of the authority granted to Congress under Article III of the Constitution. "Legislative courts" which is the class of courts to which our territorial courts belong, are not "courts of the United States." They are created by virtue of the general right of sovereignty which exists in the Government, or by virtue of that clause of the Constitution which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States.

The distinction between "courts of the United States" and "legislative courts" is brought out in the case of *McAllister v. United States* (1891) 141 U. S. 174, 179, 184, 35 L. ed. 693, 694-695, 696 decided by the United States Supreme Court in 1891, which collects the pertinent cases.

The case involved an appeal from a judgment of the Court of Claims dismissing a petition to recover a sum alleged to be due the petitioner for salary as District Judge for the District of Alaska. The President, during a Senate recess, had suspended the petitioner from his office and appointed one Dawson as his successor. Section 1768 of the U. S. Revised Statutes provided as follows:

During any recess of the Senate, the President is authorized, in his discretion, to suspend any civil officer appointed by and with the advice and consent of the Senate, *except judges of the courts of the United States*. (Emphasis added.)

The petitioner contended that he was a judge of a Court of the United States. The court held that he was not. It pointed out that the District Court of Alaska was created by Act of Congress to have and exercise the civil and criminal jurisdiction of District Courts of the United States, the judge to be appointed by the President with the advice and consent of the Senate. The court (141 U. S. 179, 35 L. ed. 694-5) said (emphasis added) :

But is the court, thus established for Alaska, one of the "*courts of the United States*" within the meaning of section 1768 of the Revised Statutes?

The Court reviewed the various cases, holding that Territorial Courts are not Courts of the United States, and said:

These cases close all discussion here as to whether territorial courts are of the class defined in the third article of the Constitution. It must be regarded as settled that *courts in the Territories*, created under the plenary municipal authority that Congress possesses over the Territories of the United States, are *not courts of the United States*.

For the reasons we have stated it must be assumed that the words "judges of the courts of the United States" in section 1768 were used with reference to the

recognized distinction between courts of the United States and merely territorial or legislative courts. 141 U. S. 184, 35 L. ed. 696.*

In *Dill v. Ebey* (1913) 229 U. S. 199, 57 L. ed. 1148, the Court held that the U. S. District Court for the Western District of the Oklahoma Indian Territory was not a court of the United States within the meaning of the United States Rev. Statutes, sec. 723 providing that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law".

Coming closer to home we have the Supreme Court of the Territory in *Kainea v. Kreuger* (1929) 30 Haw. 860 holding (quoting from the syllabus, p. 861) :

A territorial court of Hawaii is not a "court of the United States" within the purview of United States Judicial Code, section 267 (title 28, Sec. 384, U.S.C.A.) which provides that "suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law".

In *Mookini v. United States* (1938) 303 U. S. 201, 82 L. ed. 748, it was held that the United States District Court for the Territory of Hawaii was not a "District Court of the United States" within the meaning of the Criminal

* 1. Among the cases in point which are reviewed (or quoted) in the *McAllister* case *supra*, and which are so well covered by the discussion therein as to render unnecessary further quotations therefrom by us are: *American Ins. Co. v. 356 Bales of Cotton* (1828) 26 U. S. 1 Pet. 511, 546, 7 L. ed. 242, 256; *Benner v. Porter* (1850) 50 U. S. 9 How. 235, 242, 243, 13 L. ed. 119, 123; *Clinton v. Englebrecht* (1872) 80 U. S. 13 Wall. 434, 447, 20 L. ed. 659, 662; *Hornbuckle v. Toombs* (1874) 85 U. S. 18 Wall. 648, 655, 21 L. ed. 966, 967; *Good v. Martin* (1877) 95 U. S. 90, 98, 24 L. ed. 341, 344; *Reynolds v. United States* (1879) 98 U. S. 145, 154, 25 L. ed. 244, 246; *The City of Panama* (1880) 101 U. S. 453, 460, 25 L. ed. 1061, 1064. *Page v. Burnstine* (1881) 102 U. S. 664, 26 L. ed. 268, cited in the opening brief p. 32, is also distinguished in the *McAllister* case (see discussion of the *Page* case *infra*, p. 40).

Appeal Rules promulgated by the U. S. Supreme Court on May 7, 1934 (Rule III., 292 U. S. 662, 663, 78 L. ed. 1513) which by their terms were limited to proceedings "in criminal cases in District Courts of the United States and in the Supreme Court of the District of Columbia, and in all subsequent proceedings in such cases in the United States Circuit Court of Appeals, in the Court of Appeals of the District of Columbia and in the Supreme Court of the United States", such rules having been promulgated pursuant to the Act of March 8, 1934, amending the Act of February 24, 1933, 28 U.S.C.A. sec. 723a, authorizing the U. S. Supreme Court to prescribe rules in criminal cases "in District Courts of the United States, *including the District Courts of . . . Hawaii*".

A long list of authorities including the *McAllister* case is cited in support of the conclusion reached. If it be true that the *Federal* District Court of Hawaii is not a "District Court of the United States" how can it be argued with any degree of plausibility that the Circuit Court of the Second Judicial Circuit of the Territory of Hawaii is a "court of the United States" within the meaning of the Norris-LaGuardia Act?

In *Young v. U. S.*, (C.C., W.D. Okla. 1910), 176 F. 612, the court said:

. . . It was long ago settled that the *territorial* courts are *not federal courts*, and that the procedure obtaining in them is that prescribed by the territorial Legislature. *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; . . . (Citing other cases; emphasis added.)

Since the passage of the NLGA there have been a number of cases upholding its constitutionality. In these cases the courts to which the Act applies are constantly referred to as "Federal courts". For instance, see *Cinderella Theater Co., Inc., v. Sign Writers' Local Union No. 591* (D. C., E. D. Mich., 1934) 6 Fed. Supp. 164, 168; and *Grace Co. v. Williams* (8 Cir. 1938) 96 F. 2d. 478, 481.

In the majority opinion written by Mr. Chief Justice Vinson in the *Lewis* case (*U.S. v. United Mine Workers of America* (Mar. 6, 1947) 330 U.S. Adv. Shts. 258, 270-271, 91 L. ed., Adv Shts., 595, 602-3, it was said:

Moreover, it seems never to have been suggested that the proscription on injunctions found in the Clayton Act is in any respect broader than that in the Norris-LaGuardia Act. . . . This Court, on the contrary, has stated that the Norris-LaGuardia Act "*still further . . . (narrowed) the circumstances under which the federal courts could grant injunctions in labor disputes*". . . .

By the Norris-LaGuardia Act, Congress *divested the federal courts* of jurisdiction to issue injunctions in a specified class of cases. . . . (Citing the *Hutcheson* case; emphasis added.)

The scope of the Clayton Act, which has always been understood to be limited to the purely Federal courts is discussed post, pp. 47-49.

Mr. Justice Frankfurter also said, in the *Lewis* case:

. . . The Norris-LaGuardia Act deprived the *federal courts* of jurisdiction to issue injunctions in labor disputes except under conditions not here relevant. (Id. p. 624).

3. Appellants' Arguments and Authorities Do Not Establish Their Contention That "Court of the United States" Includes Both the U. S. District Court and Territorial Circuit Courts of Hawaii.

The argument on pages 16-23 of the Opening Brief begs the question by ignoring the well-defined term "*court of the United States*" which is an essential part of the definition in sec. 13 (d) of the NLGA, and construing it as though it read:

"any court whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, etc., as pointed out ante, p. 27.

The statement, p. 19 of that brief, to the effect that in the interval between annexation and enactment of the Organic Act the courts of the Territory were courts of the United States, is not supported by any authority, and appears to be at least impliedly refuted by *In re Ah Ho* (1899) 11 Haw. 654.

Practically the entire argument of the Opening Brief constitutes nothing more than setting up a straw man—the contention that the lower court based its decision on a finding that *no* legislative court was covered by the act—and then knocking it down by saying in effect “we can show that *one* legislative court is covered, therefore, the court’s decision (which did not require it to go that far) is wrong.” (See, esp. Op. Br. 55). The argument, except Point I (Op. Br. 16-23) is based upon a false premise, namely, that the Territorial Supreme Court held that the United States District Courts for the Territories, including that for Hawaii were not subject to the Norris-LaGuardia Act. Actually, as pointed out ante, p. 2, the only point decided was that a circuit court of the Territory was not a “court of the United States” within the meaning of the Norris-LaGuardia Act, and an examination of both the opinion and the ruling on motion for rehearing (R. 58, 70, 77-78) will disclose that the lower court put its decision on the sound ground that, from the language of the definition, taken in its well-defined and understood sense, and the context and legislative history of the act, no intent was disclosed to include territorial circuit courts, but rather the intent was to include the purely Federal courts.

Of course, even if Congress intended to include within the term “court of the United States” a legislative federal court, that would not signify that Congress intended to include a legislative court of non-federal jurisdiction, namely, a circuit court of the Territory of Hawaii. Moreover, as shown post, pp. 37-40, 66-67, the applicability of the NLGA provisions to the United States District Court of Hawaii does

not necessarily depend upon the question whether the term "court of the United States" is or is not confined to constitutional courts. That term may very well be confined to constitutional courts as reasoned by the Territorial supreme court, and yet the provisions governing constitutional courts may also be applicable to a legislative federal court through adoption by another act—in our case section 86 of the Hawaiian Organic Act, the congressional provision which adopts for the purposes of the legislative federal court in Hawaii the legislative provisions governing constitutional federal courts.

Appellants contend (Op. Br. 24) that the act is unambiguous, and requires no examination into the usual aids to statutory construction when the meaning is not clear. Yet in the very decision upon which they hang their main argument as to the necessity for reading the act in connection with the Clayton and Sherman Acts (to which the NLGA does not refer) — the *Hutcheson* case (1941) (312 U. S. 219, 229, 236, 85 L. ed. 788, 791, 795) — *Mr. Justice Frankfurter* refers to such aids, namely, the history of the legislation.

On page 36 of the opening brief occurs the statement that the lower court used the "distinction" of the inferior status of territorial courts "for the purpose of elevating legislative Courts of the United States above constitutional Courts" in their power to issue labor injunctions. What the lower court really did was to recognize (1) the clearly expressed purpose of Congress to leave the control over such local jurisdiction and procedure to the local legislature, and (2) that in a system such as ours, where Federal and Territorial Courts have been strictly separated as to jurisdiction and procedure, the situation is exactly the same as in a State. Such special treatment of Territorial courts in territories having a dual system, even in Territories not having such a dual court system, has been upheld time and again by the Federal courts:

Thus, in *Yeung v. Territory of Hawaii*, ante, 132 F. 2d. 374 at p. 378, this court said, quoting from an earlier decision in *Wilder's S.S. Co. v. Hind* (9 Cir.) 108 F. 113, 115-116:

. . . The system of courts created by the act for the territory of Hawaii *differs radically from the system of courts which congress had theretofore created for any of the territories.* . . . (Emphasis added.)

See, also, decisions ante, pp. 20-23, showing the *unique nature* of the territorial courts Congress established for Hawaii. There was and is, therefore, *every reason* for the lower court to differentiate these purely local territorial courts for Hawaii from the general run of Federal courts evidently contemplated by the NLGA.

In this connection see *Hind v. Wilder's S.S. Co.*, ante, 13 Haw. 174, 181-182 holding that a construction of the Organic Act making the decisions of the Territorial Supreme Court final in most cases would not be strange since "*in that respect the residents of the territories are only placed on an equal footing with the citizens of the several states.*" (Emphasis added.)

See also *Aztec Mining Co. v. Ripley* (1892) 53 F. 7, affirmed (1893) 151 U. S. 79, 38 L. ed. 80; *Folsom v. U. S.* (1895) 160 U. S. 121, 127, 40 L. ed. 363, 365.

The inapplicability of the NLGA to circuit courts of this Territory is within the clearly apparent congressional intent to confine the act to the purely federal jurisdiction, as already shown, and such ruling does not preclude the application of the act to the United States District Court for Hawaii. Even if, as reasoned by the Territorial Supreme court, Congress in the NLGA was legislating only for the constitutional courts, the provisions thereof may be adopted for and made applicable to a legislative court by another congressional provision, namely, section 86 of the Hawaiian Organic Act. The question of such adoption has been con-

sidered in a number of cases. The effectiveness of such an adoptive statute to make applicable to a District of Columbia or territorial federal court provisions governing constitutional federal courts which had been enacted *prior* to the adoptive statute, is well settled.

However, where the case involves the effect of the adoptive statute with respect to a provision subsequently enacted, the matter is not so clear. See *Munoz v. Porto Rico Ry. Light & Power Co.* (1 Cir. 1936) 83 F. 2d. 262 (cert. den. 298 U.S. 689, 80 L. ed. 1408). In that case it was held that the United States District Court for Puerto Rico was not a true United States court, and that even under a provision of its Organic Act to the effect that

. . . Such district court shall have jurisdiction of all cases cognizable in the district courts of the United States, and shall proceed in the same manner (48 U.S.C.A. § 863),

later federal acts applicable generally to the federal judiciary or to "district courts" did not apply to Puerto Rico, citing *Benedicto v. West India & Panama Telegraph Co.* (1 Cir. 1919) 256 F. 417, 419. The court said, at pages 264-5:

Congress has always defined the jurisdiction of the District Court of the United States for Puerto Rico by acts expressly applicable to that court. . . .

We think section 9 of the Organic Act of Puerto Rico 1917 (48 USCA § 734), has no application to acts expressly applicable to District Courts of the United States. It only has reference to general acts that are without special application, but are broad enough to apply to the "possessions", and in their purport are properly applicable thereto.

These cases support the lower court's view that a federal legislative court is not a "court of the United States", besides laying down the rule that, even where there is a federal stat-

ute adopting for a court of *federal* jurisdiction in a Territory the laws relating to Federal district courts generally, later Federal laws applicable generally to the United States District courts will not ordinarily be held applicable to such Federal court in the Territory, unless clearly suitable and in their purport properly applicable thereto. The *Munoz* case, *supra*, cites three decisions of the Supreme Court which, on being analyzed, show that they are based on the doctrine that an adoptive statute does not operate on a statute later enacted. However, in a later case, *Balzac v. Porto Rico* (1922) 258 U. S. 298, 66 L. ed. 627, the Supreme Court held that an adoptive statute *can* operate on a statute later enacted. Hence, under this last decision, if the Norris-LaGuardia is "broad enough to apply to the" Territory "and in its purport is properly applicable thereto" (which it probably is, in view of the fact that it amends by implication the Sherman and Clayton acts which were applicable to the Federal courts in the Territories, though not to territorial courts of purely local jurisdiction—see *Hutcheson* case, *ante*, and Op. Br. 26-7, and *Puerto Rico v. Shell Co.* (1937) 302 U. S. 253, 82 L. ed. 235) it can be given full effect as to the U. S. District Court in Hawaii through the adoptive provisions of section 86 of the Hawaiian Organic Act, without any necessity for stretching the term "court of the United States" beyond its well settled meaning as including only the constitutional federal courts. Hence the fears of appellants (Op. Br. 65-72) that a different effect will be given to the Clayton and Sherman Acts than to the NLGA in the Territory by the lower court's decision, are unfounded.

Thus, the U. S. District Court for Hawaii saw no reason why the non-inclusion of the Territorial circuit courts should militate against the inclusion of that Federal court in the operation of the NLGA. *Alesna v. Rice* (U.S.D.C. Haw. 1947) 69 F. Supp. 897, 900.

In re Maret, (3 Cir. 1944), 145 F. 2d. 431, 436, note 28, it was held that under a 1936 statute conferring on the District Court of the Virgin Islands jurisdiction of "all cases in admiralty" it had jurisdiction in an admiralty case arising under a 1943 statute.

The decision in *Mo Hock Ke Lok Po v. Stainback*, U.S.D.C. Haw. Civil No. 765, Oct. 22, 1947 concerning the applicability of section 266 of the Judicial Code, turns on the appropriateness of the section in question to the federal court in Hawaii, which we submit is the proper way to determine whether federal laws enacted after the enactment of section 86 of the Hawaiian Organic Act (Title 48, sec. 642, U.S.C.A), were made applicable to the federal court in Hawaii by that section.

While in this brief, we have produced an almost unanimous line of numerous decisions from the earliest times to date, in which "court of the United States", as used in statutes relating to jurisdiction and procedure of Federal courts, has been held not to include legislative courts, the diligence of counsel for appellants has produced but three cases, all clearly distinguishable, in which it is alleged a contrary holding has been made, namely, *Page v. Burnstine* (1881) 102 U. S. 664 (Op. Br. 32-34), *United States v. Haskins* (1875) 26 Fed. Cas. 213 (Op. Br. pp. 37-8), and *Hunt v. Palao* (1846) 4 Haw. 589, 11 L. ed. 1115 (Op. Br. 37), all of which are clearly distinguishable. Thus *Page v. Burnstine*, supra, is distinguished by the discussion thereof in the *McAllister* case, ante, p. 30, as well as by the quotation therefrom on page 33 of the opening brief, showing clearly that the main reason for holding the Federal statute applicable to District of Columbia courts in that case, was that *Congress itself* formulated *all laws, local and general*, for the District, whereas, in the Territories, there was *another legislative body*, authorized by Congress to make laws locally applicable, and whose *local enactments* therefore, would ordinar-

ily be left untouched by general federal laws, that is to say, laws designed generally to affect the Federal judiciary system. In this connection it should be unnecessary to deny the statement (Op. Br. 34) that "the Norris-LaGuardia Act is not a general law, but a law dealing with a special subject—the rights of labor". This is not true. The act applies *generally to the Federal courts*. Obviously it is a general law.

In the *Haskins* case, *supra*, sec. 33 of the Judiciary Act (later R. S. 1014) provided that for any crime against the United States the offender

may, by any justice or judge of the United States . . . be arrested, and imprisoned or bailed as the case may be for trial before such court of the United States as by this act has cognizance of the offense. . . . (1 Stat. 91).

Section 9 of the Organic Act of Utah (9 Stat. 453), a *later* act, established district courts for the territory and provided

And each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States.

Section 16 of the same act provided:

The constitution and laws of the United States are hereby extended over and declared to be in force in said territory of Utah, so far as the same, or any provision thereof, may be applicable.

The defendant Haskins was indicted by a grand jury in the Territory of Utah for an offense (perjury) against the United States, and a warrant was issued to the Marshal of the United States for Utah Territory for his arrest. He was found in California, and in proceedings in a Federal court in California, after his arrest, the defendant claimed that

section 33 of the Judiciary Act did not apply. The court held that it did apply.

Several grounds of distinction of the *Haskins* case from the present one are immediately apparent. First, Utah Territory did not have two separate systems of courts, as in Hawaii, and therefore the only court with Federal jurisdiction in that territory was the district court there, and to hold otherwise than the Court did would have had the effect of letting him go scott free from the mere fact of his escape into a State from a Territory. While this decision might tend to support a contention that the U. S. District Court of Hawaii might be included under the Norris-LaGuardia Act, by virtue of the somewhat corresponding provisions of section 86 of the Hawaiian Organic Act (as shown ante) it can hardly be stretched to a holding that a *purely local and separate territorial circuit court with no federal jurisdiction* would also be covered by the term "court of the United States". Second, it is reasonable to presume, as the court did in the *Haskins* case, that Congress intended its *criminal laws* to be uniformly enforced within both the States and the incorporated territories (in the territorial courts expressly given Federal criminal jurisdiction), whereas, there is no basis whatsoever to presume that Congress would intend the laws applicable generally to the Federal judiciary system would also apply equally to territorial courts of purely local, and having no purely Federal jurisdiction, especially where Congress in other acts has *unmistakably indicated* that it *intended the procedure and jurisdiction of such local courts to be subject to the will of the local legislature*, as pointed out ante. Thirdly, it was not necessary for the court—and a one-judge court at that—to decide that a court of Utah was a "court of the United States", for the Organic Act of Utah had expressly vested in the Utah district courts "the same jurisdiction" over such cases "as is vested in the circuit and district courts of the United States", as quoted *supra*.

Finally, the utter inapplicability of the case of *Hunt v. Palao*, supra, to a situation like the present is unmistakably demonstrated by the court's opinion in *Clinton v. Englebrecht*, quoted ante, (1872) 80 U. S. 13 Wall. 434, 20 L. Ed. 659, which gives the true rule as to the construction of the term "court of the United States" as not including legislative courts of the Territories, and says:

There is nothing in this opinion inconsistent with the cases of *Orchard v. Hughes*, or of *Hunt v. Palao*, properly understood. The first of these cases went upon the ground that the chancery jurisdiction conferred upon the courts of the Territories by the organic was beyond the reach of Territorial legislation; and the second, in which the Territorial Court of Appeals was called a court of the United States, *was only intended to distinguish it from a State court.* (Emphasis added.) (80 U.S. 448-9, 20 L. ed. 663).

The desperation of appellants in seeking for some plausible authorities to counter those holding practically unanimously contrary to their contention as to the well-defined meaning of the term "court of the United States" when used in an act of Congress applying generally to the Federal judiciary system, is illustrated by the only two other references in the opening brief, one to the Federal Digest, which naturally would place territorial courts under some general heading implying that they owed their inception to general federal legislative power and which obviously is not using the words "United States Courts" in their technical or legal sense but rather in a generic sense (op. br. p. 39) and the other to an article in 43 Harv. L. Rev. 894 (op. br. p. 40), entitled "Federal Legislative Courts", in which the author, W. G. Katz, who prepared the same "in connection with graduate study in Harvard Law School in seminar courses of Professor Felix Frankfurter". (See Note, p. 894 of article), stated (43 Harv. L. Rev. 902):

It has *thus been settled* that all territorial courts and all courts of the District of Columbia, even those whose justices hold office during good behavior, are legislative courts. (Emphasis added.)

4. The Context of the Norris-LaGuardia Act Itself Conclusively Indicates Its Inapplicability to the Local Circuit Courts.

Section 10 of the Norris-LaGuardia Act, (29 U.S.C.A. § 110) as pointed out in the lower court's decision, provides that

Whenever any Court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the Court shall, upon the request of any party to the proceedings and on his *filing the usual bond for costs*, forthwith certify as in ordinary cases the record of the case to the Circuit Court of Appeals for its review. . . .

This section is obviously designed and intended to apply to *all* "courts of the United States" where a temporary injunction is issued or denied in the first instance, and it clearly does not and can not apply to territorial circuit courts, appeals from which lie, not to a federal circuit court of appeals, but to the territorial supreme court. *Alesna v. Rice* (U.S.D.C. Haw. 1947) 69 F. Supp. 897, 900; and see, also, final decision in the same case, quoted in Appendix C hereof. Hence the term "court of the United States," as used throughout the NLGA could not have been intended to include such local circuit courts.

The title of the act also bears out this contention, as pointed out by the lower court (R. 59-68), being

An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes. (47 Stat. 70).

A mere reading of the act discloses that it is in fact solely a law directed at limiting drastically the jurisdiction and

regulating the procedure of Federal courts, and hence did clearly amend the Judicial Code which, up to that time, as construed by the Federal courts, had permitted Federal equity courts to issue labor injunctions without the limitations and regulations of the NLGA.

Corroborative of this statement as to the nature and effect of the NLGA as an amendment to the Judicial Code, might be pointed out, besides the numerous other circumstances mentioned in the foregoing pages of this brief, the following:

1. That the title of Senate Report No. 163 on the act is:
 TO DEFINE AND LIMIT THE JURISDICTION OF COURTS
 SITTING IN EQUITY.

The "other purposes" so strongly relied upon by appellants (Op. Br. 28-30) is *not even mentioned in the title* to this report, indicating clearly that, in the opinion of the Senate Judiciary Committee, the portions of the title reading "An Act to Amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity" meant one and the same thing—that the defining and limiting of jurisdiction of the equity courts concerned was an amendment of the Judicial Code which unquestionably relates primarily, if not exclusively, to the Federal courts as opposed to Territorial courts of local jurisdiction such as ours or State courts.

2. Likewise, the title of House Report No. 669 on the same act is:

DEFINE AND LIMIT THE JURISDICTION OF COURTS
 SITTING IN EQUITY.

3. The following excerpt from the debates on the act is also illuminating:

MR. MICHENER. May I ask this question: This bill, if made law, will be an addition to the Judicial Code?
 MR. CHRISTOPHERSON. Exactly.

Rep. Michener was one of the Representatives to whose remarks great significance was given in the majority opinion in the *Lewis* case (91 L. Ed. 607-8).

4. Mr. Justice Frankfurter's remarks in the *Lewis* case, quoted in Appendix D-8, p. lxi, and cited post, p. 92, showing that the title of the act (ignoring the "other purposes" portion thereof) truly represents the scope and purpose of the act, and that the act's terms justify its title.

Finally, Senate Report No. 163 on the NLGA, at page 23, referring to section 12 of the act, which provides for disqualification of judges in certain cases and for the designation of a substitute judge as "provided by law", says:

. . . Upon the finding of such a demand another judge shall be designated to hear the contempt proceeding, as provided in section 21 of the Judicial Code.

Section 21 of the Judicial Code so referred to is the one which provides for disqualification of judges of *Federal* district courts, and provides that in such cases a new judge shall be designated in the manner provided by other Judicial Code sections (28 U.S.C.A. 24 and 27), none of which apply to territorial courts having no Federal jurisdiction.

In this connection, we wish also to point out that if, as appellants' contend, (Op. Br. 50-51), sec. 10 of the NLGA is applicable to Territorial circuit courts, this would necessitate a ruling that sec. 10 by implication amended and superseded, not only most of the local statutes relating to review of circuit court judgments which provide for such review *by the Territorial Supreme Court* (See R. L. 1945, Ch. 182, Appeals; Ch. 184, Exceptions; and Ch. 186, Writs of Error), but also the general Federal statute on appellate jurisdiction of the circuit courts of appeals 28 U.S.C.A. 225. However, this possibility staggers even the appellants, who, after half-heartedly contending that Congress has the *power* to make such an amendment (Op. Br. 51), which of course it does, then seek cover in arguing that anyway the rights

under the NLGA are substantive and must therefore be given effect somehow, even if sec. 10 is inapplicable (Op. Br. 51). The "substantive rights" argument will be disposed of later in this brief.

5. The Norris-LaGuardia Act's Purpose Was to Carry Into Effect the Original Intent of the Clayton Act, Which, With the Sherman Act That It Amended, Never Applied to Circuit Courts of this Territory; Therefore the Norris-LaGuardia Act Could Not Have Been Intended to Apply to Such Local Circuit Courts.

It is contended on pages 25-8 of the opening brief, that the Norris-LaGuardia Act is an amendment of the Clayton Act and must be read in connection therewith in construing the intent of the former. The *Hutcheson* case (312 U. S. 219, 85 L. ed. 788), is quoted (Op. Br. 26) to the effect that:

The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction.

The opening brief then proceeds to quote further from that decision, which in turn quotes from the report of the House Committee on Judiciary, to the effect that

The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act . . . which act, by reason of its construction and application *by the Federal courts*, is ineffectual to accomplish the congressional intent. (Emphasis added.)

Other excerpts from and references to the Congressional reports and debates to the same effect are quoted in Appendix D-4, page 1.

Accordingly, we agree with appellants that the NLGA was intended to go as far as the Clayton Act was originally intended to go as to the courts covered, but *no further*. And

to what courts did the Clayton Act apply? Clearly not to the Territorial Circuit Courts. Appellants tacitly, if not expressly, admit this in their opening brief, pp. 49, 54, 64, 72, 73, 90, in arguing that the Clayton Act applied to *federal* district courts for the territories, and that the NLGA allegedly went "beyond the Clayton Act" in its coverage. (Op. Br. 73).

In this connection, we do not dispute that the Sherman and Clayton Acts were effective in the Territories, including Hawaii, that the definitions of "commerce" and "persons" included intrastate (or intra-territorial) commerce in the Territories and corporations organized under the laws of any Territory, (Op. Br. 27, 55-72). But we must again call this court's attention to the straw man being set up here by appellants in inferring that the lower court ruled that the U. S. District Court for Hawaii was not subject to the Clayton, Sherman or Norris-LaGuardia Acts. This is not so, as demonstrated ante, pp. 2, 35.

Appellants contend that this court should hold that the NLGA intended to confer exclusive jurisdiction on the Federal district court of Hawaii in cases involving issuance of temporary or permanent injunctions growing out of labor disputes in the Territory and thereby deprive territorial circuit courts of all jurisdiction even to entertain such suits. Op. Br. 88-90. This argument (which by its tenuousness is an implied admission of the weakness of appellant's contention that the NLGA's definition of "court of the United States" includes territorial circuit courts) is answered in the negative by *Puerto Rico v. Shell Co.* (1937) 302 U.S. 253, 82 L. ed. 235, holding that the Sherman and Clayton Acts (which appellants contend so violently should be construed in *pari materia* with the NLGA to disclose congressional intent), did not deprive Puerto Rican courts of jurisdiction under local statutes covering in part the *same area* of legislation embraced by those acts, which is not even the case here, where the NLGA and the local territorial laws con-

cerning injunctions in labor disputes cover entirely different areas of legislation—i.e., entirely different sets of courts. See, also *Territory v. Long Bell Lumber Co.* (Okla. 1908) 99 P. 911, cited with approval in the *Shell Co.* case *supra*, and *Wagner v. Minnie Harvester Co.* (Okla. 1910) 106 P. 969.

The effect, then, of appellants' contention on this point—that the scope and coverage of the Norris-LaGuardia Act is the same as that of the Clayton and Sherman Acts and must be given the same effect—is to exactly confirm the decision of the Hawaiian Supreme Court in its holding that the local laws concerning the jurisdiction and procedure of the local circuit courts were not superseded or pre-empted by the Norris-LaGuardia Act.

The trouble with Point III (pp. 55-72) of the opening brief is that it attempts to stretch the coverage of the Sherman and Clayton Acts over "commerce," "persons" and *Federal courts* in a Territory, to include *both Federal and local circuit courts* for purposes of the NLGA which is a palpable *non-sequitur*.

6. The Definition in Section 13(d), Limiting Courts Covered to "Any Court of the United States" Whose Jurisdiction Might be Affected by Congress, etc., Was Included Only Because Congress Wanted to be Sure to Exclude the Supreme Court, and to Include the Courts of the District of Columbia.

Appellants take issue (Op. Br., Point D-1, pp. 40-45) with the lower court's reasoning (Rec. 64-5) that

In restricting the definitive phrase "any court of the United States" by the clause "whose jurisdiction has been or may be conferred or defined or limited by Act of Congress" . . . the section accomplishes two primary objectives . . . One is to eliminate for the purposes of the Act the Supreme Court, whose appellate and original jurisdiction stems from the Constitution . . .

Here again, for want of an effective answer to the lower court's statement as far as it applies to the Supreme Court's *original jurisdiction*, appellants set up the straw man of *appellate jurisdiction* which, as we shall show, was not germane to the question at all, and then proceed to knock it over. We need waste no time trying to controvert the proposition that the appellate jurisdiction of the Supreme Court can be limited by Congress. If the statement by the lower court that it "stems from the constitution" is incorrect, this is still immaterial, because the remainder of the statement is emphatically true, as hereinafter demonstrated. In this connection, appellants themselves fall into grievous error in the statement (op. br. 44-5) :

The Act does not, in fact, affect the *original jurisdiction of the Supreme Court to issue injunctions* because it exercises *no original jurisdiction in equity*. This being true, the Court is attributing to Congress an absurd Act, and the Court's presumption of a Congressional intent to exclude the Supreme Court in framing the definition of the Norris-LaGuardia Act is clearly erroneous.

We have already mentioned ante, p. 29-30, Art. III, secs. 1 and 2, of the Constitution which directly vest judicial power in the Supreme Court and grant it original jurisdiction "in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party," and have pointed out that Congress could not make the Norris-LaGuardia Act applicable to a case originally brought in the Supreme Court wherein a *State* applied for an injunction in a labor dispute. This is sufficient to demonstrate the error of the foregoing statement in appellants' brief.

In *Pennsylvania v. West Virginia* (1923) 262 U. S. 553, 67 L. ed. 1117, the court held that suits in equity by two different states against West Virginia, instituted in the United States Supreme Court, praying for an *injunction* against the enforcement of an allegedly unconstitutional

West Virginia Statute, involved a "justiciable controversy between states in the sense of the Judiciary Article of the Constitution," and that the court therefore had jurisdiction to determine the same, and the injunction was granted. (262 U. S. 591, 67 L. ed. pp. 1129-1130). This was a direct holding that the *Supreme Court possessed equity powers as part of its original jurisdiction*.

Furthermore, the history of the NLGA clearly demonstrates that Congress believed that it could not thus limit the original jurisdiction of the Supreme Court, and inserted this qualification for the sole purpose of avoiding any question of constitutionality which might be raised if the original jurisdiction of the Supreme Court was attempted to be restricted by the act.

Thus it was very strongly argued by the minority (and disputed by the majority) in each House that Congress did not even have the power to limit the jurisdiction of the *inferior* Federal Courts in the manner provided by the NLGA, and it was apparently conceded by all factions, that Congress *did not have power* to limit the original jurisdiction of the Supreme Court as to the issuance of injunctions. This is clearly demonstrated by the excerpts from the debates and committee reports on the NLGA, which, with necessary explanatory remarks, are quoted in Appendix D-5, pp. li-lvi.

The statements set forth or referred to in Appendix D-5 clearly demonstrate that Congress had very definitely in mind the limitations on its power to restrict the *original* jurisdiction in equity matters conferred upon the Supreme Court by Article III, secs. 1 and 2 of the Constitution, and wished to avoid any question of constitutionality by inserting in the definition of the term "court of the United States," the limiting language "any court of the United States" whose jurisdiction (clearly meaning *original* jurisdiction) could be limited, etc., by Act of Congress. This sustains the correctness of the lower court's reasoning to the

effect that these words were inserted, not to make the definition *more inclusive*, and thereby include legislative courts, but to *exclude* the Supreme Court.

On pages 45-50, appellants assail the lower court's reasoning as to the significance of the express inclusion of the District of Columbia courts in the definition of "court of the United States" in section 13 (d) of the NLGA. To be sure the lower court appears to speculate that the reason for such express inclusion was the statement of the Supreme Court in *Ex Parte Bakelite Corporation*, (1929) 279 U. S. 438, 73 L. ed. 789, decided *three years before* the Norris-LaGuardia Act was passed, to the effect that the courts of the District of Columbia were legislative, rather than constitutional courts, it not having been held by the United States Supreme Court that they were constitutional courts until the decision in *O'Donoghue v. United States* (1933) 289 U. S. 516, 77 L. ed. 1356. Whether the *Bakelite* ruling was *obiter dicta* or not, the fact remains that at the time Congress was considering the Norris-LaGuardia Act, and until the *O'Donoghue* case was decided, it was unanimously considered by the best authorities, including Prof. Frankfurter, that the District of Columbia courts were *legislative courts*, and there was therefore strong reason for the lower court to consider such express inclusion as an implied exclusion of *other* legislative courts.

Nor was the *Bakelite** ruling as "obscure" as appellants' brief would have us believe (Op. Br. 48). It was widely written up in the law reviews in 1930, two years before the Norris-LaGuardia Act was passed. Articles on the *Bakelite* case came out in 24 Ill. L. Rev. 820 (Mar. 1930); 10 B.U.L.

* It is significant that the so-called dictum in the *Bakelite* case cites two cases, *Keller v. Potomac Elec. Power Co.* (1923) 261 U. S. 428, 442-4, 67 L. ed. 731, 736-7, and *Postum Cereal Co. v. California Fig Nut Co.* (1927) 272 U. S. 693, 700, 71 L. ed. 478-481, as authority for the statement that District of Columbia courts had been held to be legislative courts. One of these two cases is cited in 24 Ill. L.

Rev. 820, *supra*, as authority for the statement, in an article entitled "Administrative Law—Legislative Courts—U. S. Court of Customs Appeals", which reads:

There are a number of bodies or officers in our system that exercise the functions of a legislative court. The territorial courts, erected by Congress, are true courts, but fall in this class. . . . *So, too, the courts of the District of Columbia; Keller v. Potomac Elec. Power Co.* (1922) 261 U. S. 428, 442-3. . . .

The other of these two cases, the *Postum Cereal Co.* case, is cited in the Boston Law Review note, *supra* (10 B.U.L. Rev., p. 82) in support of the statement that:

The courts of the District of Columbia are held legislative under the power given Congress to exercise exclusive jurisdiction over that locality given in the United States Constitution, Art. I, § 8.

Furthermore, in Note 87 in the Article in 28 Mich. L. Rev., on page 518, Prof. Shartel of the University of Michigan Law School says:

In *ex parte Bakelite Corporation*, . . . (and in numerous other cases therein cited) the Supreme Court makes a distinction between constitutional and legislative courts of the United States. The district and circuit courts are constitutional in the sense of the distinction; the legislative courts include territorial courts, courts of the District of Columbia, the Court of Claims, the Court for Customs Appeals and other customs courts. . . . (Emphasis added.)

In this connection, this court is again reminded of the quotation from the article (cited in the opening brief, p. 40) in 43 Harv. L. Rev. 894, at page 902, quoted ante, pp. 43-4, in which it was stated to have "been settled" that "all courts of the District of Columbia . . . are legislative courts", which article was written by a protege of Prof. Frankfurter.

It is most significant to note the frequency with which Prof. Frankfurter is quoted or referred to in both reports (House and Senate) (H. Rept. No. 669, p. 12; Sen. Rept. No. 163, pp. 3, 8, 21). It should be noted also, that the case of *Keller v. Potomac Electric Power Co.*, *supra*, cited in Prof. Frankfurter's memorandum at the end of the House Report, p. 16, although on another point (that constitutional courts—referred to merely as "courts" in the memorandum—may not be given the duty of passing upon matters which other branches of the Government are peculiarly adapted to decide, the memo saying: "These are the types of cases in which the power of Congress over the judiciary has been successfully controverted"), is one of the two decisions cited in the *Bakelite* case on the proposition that District of Columbia Courts are legislative courts.

Rev. 81 (Jan. 1930) ; 28 Mich. L. Rev. 485, 518, Note 87 (Mar. 1930) ; and all of these were referred to in connection with the *Bakelite* case in a note on the first page of the very article in 43 Harv. L. Rev. 894 (published Apr. 1930) cited on page 40 of the opening brief, and discussed ante pp. 43-4, and note pp. 52-3.

It will thus be seen that the so-called dictum in the *Bakelite* case was neither obscure nor unnoticed by the general authorities, and that, in any event, it was regarded, as early as 1930, when the above mentioned Law Review Articles were published, as *settled law* that the District of Columbia Courts were legislative courts. Congress could very well, therefore, have inserted the express inclusion of such courts in the definition of section 13 (d) of the NLGA, for the purpose of making it certain that such courts were included, even if they ordinarily would not, as supposedly legislative courts, be included in the term "court of the United States," and this would naturally lead to an implication that other legislative courts were not intended to be included.

On the other hand, the only two other possible reasons that we can think of why Congress should have thus expressly included the District of Columbia Courts, are: (a) that the Federal courts of the District of Columbia had often been called upon to issue labor injunctions of the type considered improper by Congress, and instances had been cited in the Congressional debates of such injunctions issued by those courts; Congress would therefore naturally want to include them expressly, lest, because of their supposedly special nature (having both Federal and local jurisdiction) they be thought to have been purposely omitted; on the other hand there was not cited, throughout the entire congressional debates, a single instance, so far as we have been able to find from reading the entire record thereof, of an alleged abuse of labor injunctive powers by a territorial Federal or local court; and (b) that possibly Congress felt it desirable to conform to the terminology of the Clayton

Act, which, in sections 21 and 23 thereof, (28 U.S.C.A. 386, 388) regulating contempt procedure speaks of contemptuous violations of any writ, etc., of "any district court of the United States or any court of the District of Columbia" (sec. 21), and provides for admission to bail on appeal in a reasonable sum required by the "court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia."

None of these reasons, however, would militate against the ultimate conclusion of the lower court herein that, in any event territorial circuit courts of purely local jurisdiction were not intended to be covered by the Norris-LaGuardia Act, for, under any theory whatsoever that may be adopted to account for Congress's actions, if it took express mention to be sure that the Courts of the District of Columbia were included in the act, how much more specific would Congress have been in order to be sure that territorial courts with *no federal jurisdiction whatsoever*, would be included, if such had been their remotest intention.

7. The History of this Legislation Shows Clearly that Congress Had in Mind the Constitutional Inferior Federal Courts and Those of the District of Columbia Only, and That Its Purpose Was to Correct Abuses in the Federal Courts Only.

We shall now proceed to show from the committee reports, the Congressional debates, and other historical circumstances, that the evil aimed at by this act was abuses of the injunctive powers by the Federal constitutional inferior courts and those in the District of Columbia, and that Congress, throughout the entire process of formulating this legislation, had only such courts in mind. Justification of this resort to the history of the act is more specifically pointed out *infra*. This is offered, not to prove that the United States District Court for Hawaii is not covered by

the act, but rather to show an utter lack of intent in the act to include non-Federal, purely local Territorial courts such as our circuit court, and thereby to supersede local laws on the jurisdiction and procedure of such local courts.

A. Reference to Legislative History is Proper in This Case.

It is a cardinal principle of statutory construction, where the words of a law are not clear, as in this case with respect to purely territorial courts, that the committee reports and congressional debates, and the history of the legislation may be resorted to, in order to determine what was the condition sought to be remedied and therefrom derive the intent of the law-making body.

Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from the reports of the Congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure.

When the legislative history of the bill is thus surveyed, it becomes clear that to construe the Act otherwise than as giving the courts broad power to curtail the stay for the protection of the mortgagee would be inconsistent not only with provisions of the Act, but with the committee reports and with the exposition of the bill made in both Houses by its authors and those in charge of the bill and accepted by the Congress without dissent. We construe it as giving the courts such power.

Brandeis, J., in *Wright v. Mountain Trust Bank*
(1937) 300 U. S. 440, 463-4, 81 L. Ed. 736, 744.

In view of the well-settled meaning of the words "court of the United States" prior to the adoption of the Norris-LaGuardia Act to mean only the constitutional Federal courts (ante, pp. 29-34), the express inclusion of the District of Columbia courts without express mention of the Federal or any other courts in the Territories (ante, pp. 49-55), the inappropriate and incongruous language of

section 10 of the act if Territorial circuit courts are attempted to be brought into the purview of the act (ante, pp. 44-47), it must be certainly conceded that the inclusion of such territorial circuit courts within the act is not clear. Of course, appellees contend that the language of the act is clearly exclusive of local Territorial circuit courts, but, if it is not (as contended by appellants), then there is sufficient ambiguity, in view of the circumstances pointed out above in this paragraph, to warrant our resorting to the reports and debates of Congress, the history of the legislation, and other appropriate aids to statutory construction where the meaning is not clear and unequivocal. As already pointed out ante, p. 36, even Justice Frankfurter, in the *Hutcheson* case, found it necessary to resort to such extrinsic aids to reach his conclusion that the scope of section 20 of the Clayton Act (as previously construed by the courts) had been broadened by the Norris-LaGuardia Act. And in the so-called *Lewis* case (*U. S. v. United Mine Workers of America* (Mar. 6, 1947) 330 U. S. (Adv. Sht.) 258, 91 L. Ed. (Adv. Sht.) 595) the majority of the court delve copiously into the history and debates on this act to assist in reaching their conclusion that the act did not restrict the *Federal courts* in issuing injunctions in certain labor disputes where the Government was the petitioner. Thus the Chief Justice, in the majority opinion, refers to the comments on the bill of "Representative LaGuardia, the House sponsor of the bill" (91 L. Ed. 606), to disprove any Congressional "intent to legislate concerning the relationship between the United States and its employees" (Id. p. 606); to the debates in both Houses and numerous references therein to previous instances in which the United States had resorted to the injunctive process in labor disputes between private employers and private employees to "indicate that Congress, in passing the Act, did not intend to permit the United States to continue to intervene by injunction in

purely private labor disputes" (Id. pp. 606-7) ; and then says:

. . . Indeed, when we look further into the history of the Act, we find other events which unequivocally demonstrate that injunctive relief was not intended to be withdrawn in the latter situation. (Id. p. 607) .

Then follows a reference to views stated by Minority leader Michener, and Rep. Schneider, with the comment:

We cannot but believe that the House accepted these authoritative representations as to the proper construction of the bill. (Id. p. 607) .

Turning to the dissenting opinion (in part) of Mr. Justice Frankfurter, upon whose opinion in the *Hutcheson* case so much reliance is placed in appellants' brief, we find that even he resorted to the history of the act and the debates thereon (Id. pp. 625-628) . Similar resort to the legislative history of the NLGA in seeking light on the Congressional intent is made in the dissents or partial dissents of Justices Black, Douglas and Murphy in the same case. (Id. pp. 632. 637-9) .

B. References in Reports and Debates to Federal Courts and Federal Judges.

Having thus established the propriety of resorting to the legislative and other history of the act to determine congressional interest in this connection, we find the following significant circumstances as to intent, disclosed by that history, indicating that Congress's attention was directed solely to the constitutional Inferior Federal Courts and those of the District of Columbia, and at the most to purely Federal courts.

The Congressional Record, as well as the reports of both Judiciary Committees of the House and Senate on the NLGA bear out the above views of Prof. Frankfurter, being

replete with references to the *Federal* courts as the only ones whose alleged abuses were the occasion for and the subject of the remedial provisions of the act, and the only ones whose jurisdiction and powers were aimed at. It is fair to say that these expressions occur on almost every page of these reports and debates, whereas *not once*, as far as we have been able to discover, has there been a reference in any of these reports and debates to a Federal court in a Territory or any other legislative court (other than the then supposed-to-be-legislative courts of the District of Columbia), nor is there any statement in those reports and debates, we submit, which by any fair interpretation can be construed to have in contemplation purely territorial courts of local jurisdiction such as our circuit courts. See typical statement of Rep. Sweeney, and other references in Appendix D-6, pp. lvi-lvii, as well as other excerpts throughout this brief and in Appendices.

Incidentally, it would not appear amiss, in view of the recent abusive trends which brought about the decision in the *Lewis* case and the enactment of the Taft-Hartley Law, to quote Rep. Fernandez's prophetic remarks:

Because of the injustices and abuse of power on the part of some of the Federal judges this legislation was enacted; and if, on the other hand, labor organizations or their sympathizers will unscrupulously violate the intention of this act, they will in no uncertain terms draw the same condemnation to these practices from the great American people, so much so as the far-reaching injunctions heretofore issued and now the issue of rebuke. (75 Cong. Rec. 5513).

C. Federal Judges with Life Tenure Were Particularly the Targets of Criticism.

A further indication that, in considering the act, Congress did not have in mind Federal courts in the Territories, *much less* territorial circuit courts of purely local jurisdiction, is found in the specific references, in the debates, to

Federal judges with life tenure. In none of the Territories or possessions, except in the District of Columbia, whose courts were specifically included in the act, did the judges enjoy life tenure at the time the act was under consideration. Examples of such references in the debates are the remarks of Sen. Norris, the chief proponent of the bill in the Senate, and Rep. Black quoted in Appendix D-7, p. lvii-lviii.

IV.

Whether or not the NLGA as construed in the Hutcheson case confers substantive rights, is immaterial to the issues of this case.

Throughout most of their opening brief, appellants appear to rely upon the so-called "substantive rights" allegedly granted by the NLGA as that act is claimed by them to have been construed in *U.S. v. Hutcheson* (1941) 312 U.S. 219, 85 L. Ed. 788 (Op. Br. 25-31, 51, 56-88). This contention will be discussed generally later (*infra* pp. 65 et seq.).

It is not clear from the opening brief just what alleged substantive rights claimed to have been conferred by the NLGA on appellants were infringed by the issuance of the injunction in this case in the Second Circuit Court of the Territory, nor is it clear just what bearing such alleged substantive rights have on the question of the proper construction of the term "court of the United States" or other provisions of the NLGA.

1. Nowhere in the Record is the Question of Alleged Infringement of Substantive Rights Raised.

R.L. Hawaii 1945, Sec. 10271, provides, with respect to the requirements in a petition for a writ of prohibition, that

The defendant who applies for this writ shall apply by petition addressed to the justices of the supreme court, or to any single justice thereof, or to a circuit judge, stating the cause and nature of the action

brought against him, and *showing that the inferior court is not competent to try it, or that it has exceeded its jurisdiction in the trial or hearing of such action*, which petition shall be verified by the oath of the applicant or by some other person on his behalf cognizant of the facts. (Emphasis added.)

The Territorial supreme court, in *Carter v. Gear* (1905) 16 Haw. 412, 417-418, said:

The propriety of issuing the restraining order in this instance cannot be inquired into upon prohibition. The question of power is the only one that can be considered. . . . We cannot find that a circuit judge sitting in probate is absolutely without such power under the particular circumstances of this case so as to justify the issuance of a writ of prohibition.

In *Bandini Petroleum Co. v. Superior Ct.* (1931) 284 U.S. 8, 76 L. ed. 136, which was an appeal from the refusal of the California appellate courts to issue a writ of prohibition to a California trial court which had issued a temporary injunction under a California Statute for conservation of natural resources, the Supreme Court held that the writ of prohibition is not available as a substitute for an appeal from a court having jurisdiction; and that a petition for such a writ to restrain the enforcement of an injunction issued by another court cannot, by annexing to and making a part of the petition the pleadings in the injunction suit and the affidavits presented upon the hearing of the application for preliminary injunction, or by a characterization of the evidence thus adduced, or by pleading the conclusions derived therefrom, substitute the court to which application for the writ is made for the court to which the writ is sought, in the determination of the facts, or of the law addressed to the facts, which should properly be considered by the latter tribunal.

If, therefore, the second circuit court had jurisdiction to

issue an injunction in a labor dispute without complying with the formal and procedural requirements of the Norris-LaGuardia Act—on the theory sustained by the territorial supreme court that it was not a “court of the United States” within the meaning of that act—the propriety of the issuance of the injunction would not, under the foregoing decisions, be a proper subject for the writ of prohibition, at least unless the injunction was absolutely void.

However, no claim was made before the supreme court of the Territory in the Petition for Writ of Prohibition, or elsewhere in the record, or even in the assignments of error, that could be construed as a claim that substantive rights were infringed by the terms of the injunction—the only claim being made throughout the entire case being one of failure on the part of the petitioners in the injunction suit in the Second Circuit Court to allege, and failure on the part of the circuit court to require compliance with or make findings in accordance with certain procedural requirements specifically named in the Petition for Writ of Prohibition as alleged requirements of the NLGA claimed to be applicable directly to the Second Circuit Court on the sole ground that it was allegedly literally a “court of the United States” under that act.

The Petition for the writ of prohibition, after stating that the petitioners are trade unions, or members or officials thereof (Paras. I, II; R. 16), that a petition for injunction had been filed by the corporate respondent Maui Agricultural Co., Ltd., and a temporary restraining order had been issued ex parte by the respondent Wirtz, Judge of the Second Circuit Court (Paras. III-VII; R. 16-17), and the existence of a labor dispute (Para. VIII; R. 18), alleges (R. 18-20) :

IX.

That said Circuit Court . . . is a court of the United States as defined under the . . . Norris-LaGuardia Act (29 U.S.C.A. sections 101, 113) .

X.

That under the terms of the said Norris-LaGuardia Act no court of the United States may issue an injunction or restraining order in a labor dispute without first complying with all of the terms and provisions of said Act.

XI.

That on the face of said petition for injunction it is not shown that petitioners in said petition for injunction have complied with the terms of said Act, nor have they in fact complied with the provisions of said Act, and your petitioners affirmatively allege that petitioners in said petition for injunction did not, and have not complied with said Act, in the following respects, among others: . . .

(Then follow seven allegations of alleged failure of the allegations of the petition to conform to the literal requirements of the NLGA or of the court to conform thereto.)

XII.

That by virtue of the terms and provisions of said Norris-LaGuardia Act, and the allegations contained in this petition said Honorable Cable Wirtz as judge of said court and said court as aforesaid were and are without jurisdiction to proceed further, or proceed at all in relation to the matters set forth in said petition or to make any adjudication therein or issue any orders therein, and were without jurisdiction to issue said temporary restraining order, or said order to show cause issued in said proceedings. . . .

None of these allegations can be construed to raise any question of the propriety of the issuance of the temporary restraining order or of the terms of the order either as it might affect alleged substantive rights or otherwise, if the Second Circuit Court is not a "court of the United States" as defined in the Act. The return of Judge Wirtz to the alternative writ of prohibition denies that the Second Cir-

cuit Court is a "court of the United States" within the meaning of the NLGA, (Paras. III-V, VIII; R. 46-50, 54-55). Likewise, the return of the Maui Agricultural Co., Ltd., denied that the Second Circuit Court was a "court of the United States" as defined in the NLGA and denied the act's applicability to a circuit court of the Territory (Paras. II and III; R. 56). Judge Wirtz's return further alleges that the temporary restraining order was properly and lawfully issued

for good and sufficient cause and in accordance with the laws, practice and rules of court applicable to said Circuit Court and the Judge thereof presiding at chambers in equity. (Para. VIII; R. 54).

The petitioners for the writ of prohibition (appellants herein) made neither formal nor informal denial of the allegations of the returns, including the last quotation above from Judge Wirtz's return, and the Territorial Supreme Court found that the procedure followed by Judge Wirtz was "admittedly in conformity with the laws of the Territory", the procedure required by the NLGA being held not applicable to such circuit court as not being a "court of the United States" (Op. Terr. Sup. Ct., R. 58; on Rehearing, R. 77).

Nor do the assignments of error (R. 5-6), raise any contention of deprivation of substantive rights, or point out in any way any alleged substantive rights of which appellants have been deprived. Hence, the only issue before the territorial supreme court, as already pointed out ante, pp. 2, 4, was not whether the terms of the restraining order itself deprived the appellants herein of substantive rights, but whether the Second Circuit Court was a "court of the United States" as defined in that act. For this reason, it is submitted that the question of whether the NLGA, as construed in the *Hutcheson* case, confers substantive rights is absolutely immaterial to the issues of this case. Further

analysis of the "substantive rights" claim will make this even more apparent.

2. The Norris-LaGuardia Act is Primarily a Procedural Statute, and Relates to the Purely Federal Courts, and Its Substantive Effect, If Any, Relates Only to Penalties Prescribed by Federal Statutes, or the Denial of Rights of Action in Federal Courts.

A. The "Substantive Rights" Argument is an Attempt to Achieve Indirectly an Effect on the Territorial Courts which the NLGA does not have Directly.

Although this is not clear from the opening brief, it is possible that appellants intended to argue that if, as contended by them, the Norris-LaGuardia Act conferred substantive rights, then, regardless of any inadequacies of verbiage in the Act, the Territorial Courts must give effect to those substantive rights by declining to take any action which would adversely affect such rights. This is but another way of arguing that the Act contains clear indications of some overriding Congressional intent which can only be given effect by holding circuit courts of the Territory subject to the NLGA even though they are not to be "courts of the United States" within the definition of the Act. However, the opening brief fails to point out the one thing essential to make this argument effective or even applicable, namely, what are those alleged substantive rights which they contend the issuance of the temporary restraining order by the Second Circuit Court adversely affected, nor is the question raised by the record (see ante, pp. 60-65).

The statements of public policy of the United States contained in secs. 2 and 3 of the Act (29 U.S.C.A. 102, 103) and some dicta in and the alleged substantive effect of the *Hutcheson* case are relied upon to indicate such an intent. (Op. Br. 26, 27, 51, 53, 56-72, 74-88). Such arguments utterly overlook the scheme and purpose of the NLGA, as

carefully worked out by Congress and developed *infra*. As already pointed out (*ante*, pp. 27-29) the statements of public policy in those sections of the Act are carefully tied down to enforcement or attempted enforcement of rights claimed contrary to such public policy *in the "courts of the United States"* as defined in that Act. That is to say, the policies are to be enforced with respect to the jurisdiction and procedure of those courts and those courts alone which are defined in the Act.

The *Hutcheson* case merely did what every court from time immemorial has done in construing statutes—it took the Sherman, the Clayton and the Norris-LaGuardia Acts, all of them directed the *same subject*, at least as far as jurisdiction and procedure of Federal courts is concerned, particularly with reference to injunctions in labor disputes (which is the exact subject covered by section 20 of the Clayton Act), and all of them relating to the *same courts* (taking the utmost coverage of courts that the NLGA can be construed to cover consistently with its own provisions), that is to say, the *purely Federal courts*, and construed them together *in pari materia*. Moreover, the very legislative history and congressional reports and debates on the NLGA expressly tied that act in with the Sherman and Clayton Acts as one whole system of laws and this was pointed out in Mr. Justice Frankfurter's opinion in the *Hutcheson* case. There is nothing in any of such reports and debates to tie that Act in with our Territorial courts of non-Federal jurisdiction.

As pointed out *ante*, pp. 35, 37-40, it is not necessary to hold territorial circuit courts of non-Federal jurisdiction to be included within the coverage of the NLGA, in order to give *full scope and coverage* to both that act and the Sherman and Clayton Acts. If, as claimed by appellants (*Op. Br.* 55-72), the same scope must be given in the territories to the NLGA as is given in them to the Sherman and Clayton Acts, the same full scope and coverage accorded the Sher-

man and Clayton Acts can be given to the NLGA in Hawaii by holding that the Federal District Court in Hawaii is also subject to the NLGA. There is thus no inconsistency with any Federal statute.

B. The "Substantive Rights" Under the Last Clause of Sec. 20 of the Clayton Act and Sec. 4 of the Norris-LaGuardia Act Construed Together Relate to Federal Law Only and Do Not Affect Territorial Law.

(1) The Meaning of "Substantive Rights".

It is necessary at the outset to determine just what is meant by "substantive rights". Substantive rights are rights which arise or exist by reason of statute or other law dealing with matters of substance, as distinguished from statute or other law dealing with matters of procedure. In other words, "substantive rights" are rights created by substantive law, which has been defined

as meaning that part of the law which created, defines and regulates rights, as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion. (Ballentine, Law Dictionary, p. 1246).

Although the authorities are not uniform as to whether various types of statutes or other law are substantive on the one hand, or adjective or remedial on the other, in their effect in a given situation, the above is the true technical distinction between the two types of rights and the two types of law which create them.

The first paragraph and all except the last clause of the second paragraph of Section 20 of the Clayton Act (29 U.S.C.A. 52) relate to procedural matters only, i.e., they restrict and define injunctive relief which may be granted by courts of the United States in certain cases relating to labor disputes.

Similarly Section 4 of the Norris-LaGuardia Act (29 U. S. C. A. 104) purports by its language to relate to pro-

cedural matters only, i.e., its restricts and defines injunctive relief which may be granted by courts of the United States in cases involving or growing out of labor disputes.

Whatever substantive rights may be claimed under Section 20 of the Clayton Act exist under and by reason of the last clause of Section 20, to the effect that:

Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Any substantive rights under Section 4 of the Norris-LaGuardia Act exist under and by reason of the decision of the United States Supreme Court in *United States v. Hutcheson*, (1941) 312 U.S. 219, 236, 85 L. ed. 788, 795. We are prepared to assume,* for the purpose of our argument, that the Supreme Court held in the *Hutcheson* case that Congress, by enacting Section 4 of the Norris-LaGuardia Act, intended that the specified acts listed in Section 4 should be removed from the taint of being a "violation of any law of the United States", including the Sherman Anti-Trust Act. In other words we are prepared to assume that the Supreme Court held that the last clause of Section 20 of the Clayton Act is applicable, not only to the specified acts listed in said Section 20, but also to the specified acts listed in Section 4 of the Norris-LaGuardia Act.

* There is some doubt as to the correctness of the assumption made in the foregoing paragraph. It may be that the decision in the *Hutcheson* case merely held that the terms "labor dispute" and "persons participating or interested" therein, as defined in Section 13 of the Norris-LaGuardia Act (29 U.S.C. 113), should be accepted as indicating the Congressional true meaning of labor disputes under Section 20 of the Clayton Act. There is considerable in the opinion of the court in the *Hutcheson* case to indicate that this was the extent of its decision. Furthermore the opinion of Mr. Justice Stone, concurring, assumed that this was the extent of the decision. If this was the extent of the decision, then Section 4 of the NLGA does not create substantive rights and is of procedural significance only. Nevertheless, as above stated, our argument is based on the assumption above stated.

(2) *The Substantive Rights Relate to Federal Law Only, not to Territorial Law.*

It appears to be the position of appellants that the last clause of Sec. 20 of the Clayton Act and Sec. 4 of the NLGA operate as limitations on Territorial law as well as limitations on Federal law. It is our position however that such provisions operate only as limitations on Federal law. (As used in the argument hereinafter "sec. 20" refers to sec. 20 of the Clayton Act, and "sec. 4" refers to sec. 4 of the NLGA.)

The motive behind the adoption of Section 20, and particularly the last clause thereof, was to amend the substantive provisions of the Sherman Anti-Trust Act (15 U.S.C.A. 1-7) and to restrict the issuance of restraining orders and injunctions under the Sherman Act in labor dispute cases. And because of a suggestion made to Congress that certain judges had relied on Federal statutory provisions other than the Sherman Act as justifying the issuance of injunctions in labor dispute cases it was provided in the last clause of the second paragraph of sec. 20 that none of the specified acts listed in the paragraph should be considered or held to be in violation of *any* law of the United States—rather than merely in violation of the Sherman Act or the anti-trust laws generally. See 51 Cong. Rec., pp. 14365-14367.

The legislative history of the last clause of sec. 20 *supra* is extremely informative on this point. The Clayton Act was first introduced into and passed by the House of Representatives. As the Act went from the House of Representatives to the Senate, the present sec. 20 was sec. 18. At that time the language of the last clause was as follows:

nor shall any of the acts specified in this paragraph be considered or held to be unlawful.

The Senate Committee recommended that the word "unlawful" be eliminated and that the words "to be violations of

the anti-trust laws" be substituted. As so amended the language of the last clause would have been as follows:

nor shall any of the acts specified in this paragraph be considered or held to be violations of the anti-trust laws.

On the floor of the Senate an amendment was moved and adopted to substitute the words "any law of the United States" for the words "the anti-trust laws". By this amendment the final language was adopted, as follows:

nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

The debate on the floor of the Senate with respect to the language of the last clause clearly indicates the reasons for the changes. The important point is the reason given for eliminating the original language, to the effect that none of the acts specified in the paragraph should be considered or held to be "unlawful". It was pointed out that under the original language it might be held that none of the specified acts could be proscribed by state common law or state statutory law. It was pointed out that the first of the specified acts was "terminating any relation of employment", and that if the termination of any relation of employment was declared by Congress to be not unlawful generally, then it might be impossible for an employee to obtain redress in a state court in case an employer violated a contract of employment by discharging the employee contrary of the terms of the contract. The discussion, and the changes made in the language of the last clause, make it clear that the purpose of the last clause was merely to modify the substantive provisions of the Sherman Act (and of any other Federal statutes which might be affected), so that such provisions should not be deemed to prohibit any of the specified acts. See 51 Cong. Rec., pp. 14365-14367.

It was not intended by sec. 20 to prohibit injunctions in

labor dispute cases in state courts or in any way to modify substantive state law. The language of the last clause was changed so that a wrongful termination of a contract of employment could serve the basis of appropriate action in a state court, notwithstanding that the first of the specified acts was "terminating any relation of employment". Numerous decisions in the United States Supreme Court and also decisions of state courts recognize the right of state courts to issue injunctions in labor dispute cases. See, for instance, *Milkwagon Drivers Union v. Meadowmoor Dairies*, (1941), 312 U. S. 287, 85 L. ed. 836; *Carpenters & Joiners Union v. Ritter's Cafe*, (1942), 315 U. S. 722, 738-739, 86 L. ed. 1143, 1153-4; *Weyerhaeuser Timber Co. v. Everett Dist. Council*, (1941), 11 Wash. 2d. 503, 119 Pac. 2d. 643; *Isolantite v. United Electrical Etc., Workers*, (1942), 132 N. J. Eq. 613, 29 Atl. 2d. 183; *Western Electric Co. v. Western Electric Employees Association*, (1946), 137 N. J. Eq. 489, 45 Atl. 2d. 695, and *U. S. Elec. Motors v. United E. R. & M. Workers*, (1946), 166 Pac. 2d. 921, Super. Ct. of Calif., L. A. Co. Moreover Congress itself acknowledged that the jurisdiction and powers of State courts in respect of labor disputes were unimpaired even by the NLGA. (See *infra*, pp. 90-92, Appendix D-8, pp. lxii-lxix).

The situation must be the same in a territory as in a state. When Congress provided that the Sherman Anti-Trust Act (and any other Federal statute) should not be deemed to prohibit "terminating any relation of employment", to take one example, it no more intended to eliminate the common law or statutory law of a territory with respect to rights and remedies for breach of contract than it intended to eliminate the common law or statutory law of a state with respect to similar rights and remedies.

As above stated the purpose of sec. 20 of the Clayton Act was to amend the Sherman Act. Similarly the purpose of sec. 4 of the NLGA was to amend the Sherman Act. This is all made clear by the opinion in the *Hutcheson* case, in

which it is stated in effect that the Sherman, the Clayton and the Norris-LaGuardia Acts must be considered together.

The Sherman Act prohibits combinations or conspiracies in restraint of trade or commerce. Sec. 20 and sec. 4 establish exceptions to such prohibitions. For example, the specified act listed in paragraph (h) of sec. 4 is "Agreeing with other persons to do or not to do any of the acts" specified in the previous paragraphs. Such agreements might, but for sec. 4, be held to be combinations or conspiracies in restraint of trade or commerce. Under sec. 4 they cannot be held to be combinations or conspiracies in restraint of trade or commerce.

The Sherman Act prohibits combinations or conspiracies in restraint of trade or commerce generally. Sec. 20 and sec. 4 provide that certain specified acts, even though they would otherwise constitute combinations or conspiracies in restraint of trade or commerce, cannot be held to be "violations of any law of the United States". The result is that such specified acts cannot be held to be violations of the Sherman Act. We are therefore dealing with a Federal law, the Sherman Act, and its exceptions. An exception to a Federal law limits the impact to that Federal law, but it does not affect local law whether state or territorial.

Sec. 1 of the Sherman Act (15 U.S.C. 1) prohibits combinations or conspiracies in restraint of trade or commerce among the several states or with foreign nations. Sec. 3 of the same act prohibits combinations or conspiracies in restraint of trade or commerce in any territory. The whole argument of appellants, to the effect that sec. 20 and sec. 4 operate as limitations on Territorial law, is based on the fact that sec. 3 of the Sherman Act prohibits combinations or conspiracies in restraint of trade within a territory.

The argument of appellants ignores the fact that we are dealing with the Sherman Act and exceptions to that Act. It is true that the Sherman Act is applicable to combinations or conspiracies in restraint of trade within a territory. But

the exceptions afforded by sec. 20 and sec. 4 merely provide that the Sherman Act, as applicable to combinations or conspiracies in restraint of trade within a territory, does not prohibit any of the specified acts listed in sec. 20 and sec. 4. If a petitioner in equity in a trial court alleges a violation of his common law rights, he is not relying on the Sherman Act as the source of his rights, and therefore it is immaterial that the scope of the Sherman Act is limited in labor disputes.

Appellants particularly rely on secs. 3 and 4 of the NLGA as conferring "substantive rights", which they allege to be (Op. Br. 76) :

(1) 'The right to be free from yellow-dog contracts which are made unenforceable and void as against public policy. (29 USCA 103) .

(2) In any labor dispute, as broadly defined in the Act, to do *singly and in concert* all the acts specifically enumerated in Sec. 104.

Since appellants have been either unable or unwilling to specify in their pleadings, assignments of error or elsewhere in the record, or even in their briefs, just what "substantive rights" they claim were infringed by the issuance of the temporary restraining order in this case it should not be necessary to further lengthen this brief by attempting to imagine what appellants have in mind and then answering the imagined contentions, especially since they are immaterial to the present issue (see ante, pp. 60-65) . However, we feel compelled, from an abundance of caution and the fact that we must put all of our argument in this answering brief, to discuss the subject in a general way.

The absurdity of the "substantive rights" contention in general can be clearly demonstrated by a few examples. Let us assume, for the purpose of the examples stated below, that paragraphs (e) and (f) of sec. 4 of the NLGA provide in effect that mass picketing having for its purpose the obstruc-

tion of ingress and egress does not constitute a violation of any law of the United States, including the Sherman Act.

Example 1: If such mass picketing is indulged in in Pennsylvania, with respect to an enterprise which is engaged in interstate commerce, and such mass picketing interferes with such interstate commerce, paragraphs (e) and (f) of sec. 4 prohibit such mass picketing from being held to be a combination or conspiracy in restraint of interstate commerce.

Example 2: If such mass picketing is indulged in in Hawaii, with respect to an enterprise which is engaged in interstate commerce, and such mass picketing interferes with such interstate commerce, paragraphs (e) and (f) of sec. 4 prohibit such mass picketing from being held to be a combination or conspiracy in restraint of interstate commerce.

Example 3: If such mass picketing is indulged in in Hawaii, with respect to an enterprise which is engaged only in commerce within the Territory, and such mass picketing interferes with such commerce within the Territory, paragraphs (e) and (f) of sec. 4 prohibit such mass picketing from being held to be a combination or conspiracy in restraint of commerce within the Territory.

But the fact that mass picketing having for its purpose to obstruct ingress and egress is not in violation of the Sherman Act as applied to commerce within the Territory does not mean that such mass picketing is not in violation of common law rights recognized by the Territory.

The fact that it is expressly provided that the Sherman Act or other Federal legislation does not prohibit certain specified acts does not mean that a state or a territory cannot prohibit such specified acts (subject of course to constitutional limitations). The Sherman Act might very well have been interpreted by the courts as not being applicable to labor combinations. (In fact the purpose of sec. 20 of the Clayton Act, and subsequently the purpose of the NLGA were to correct what were believed to be errors in the inter-

pretation of the Sherman Act by the courts.) If the Sherman Act has been interpreted as above suggested then there would have been no reason for the express provisions of sec. 20 of the Clayton Act. In such case the Federal law, i.e., the meaning of the Sherman Act, would be the same as it is now. But in such case certainly it would never be urged that the regulation of labor combinations is beyond the control of state or territorial power merely because such regulation is not covered by the Sherman Act. The situation, so far as state or territorial authority is concerned, cannot be different when the interpretation of the Sherman Act is corrected by the provisions of sec. 20 of the Clayton Act and the provisions of the NLGA than the situation would be if the Sherman Act had always been interpreted as not being applicable to labor relation and had not required correction.

Appellants refer to the fact that Congress, in the enactment of the Sherman Act, acted under its "plenary power" to legislate for the Territory of Hawaii, as well as under its power to regulate interstate and foreign commerce. (Op. Br. 60-64.) It is true that Congress has "plenary power" (subject to constitutional limitations) to legislate for the Territory of Hawaii; that Congress acted under such "plenary power" in providing that the Sherman Anti-Trust Act should prohibit combinations or conspiracies in restraint of trade within the Territory; and that Congress acted under such "plenary power" in establishing the exceptions to the Sherman Act stated in sec. 20 and sec. 4.

But Congress exercised such "plenary power" only with respect to the subject matter of the Sherman Act, i.e., combinations or conspiracies in restraint of trade or commerce within the Territory. Sec. 3 of the Sherman Act prohibits combinations or conspiracies in restraint of trade or commerce within the Territory generally. Sec. 20 (Clayton Act) and sec. 4 (NLGA) provide that certain specified acts, even though they might otherwise constitute combina-

tions or conspiracies in restraint of such trade or commerce, are not violations of the Sherman Act because they are not "violations of any law of the United States." Congress, by providing exceptions to the application of sec. 3 of the Sherman Act, cannot be deemed to have had any intent to do anything else. More specifically, Congress cannot be deemed to have had any intent to take away from the Territory its normal power with respect to matters which are not related to combinations or conspiracies in restraint of trade or commerce. See *Brown v. Coumanis*, 5 Cir. 1943, 135 F 2d. 163, 146 ALR 1241 in which the court held that the NLGA did not intend to put within the protection of the federal courts all labor disputes, and that its purpose was not to enlarge federal jurisdiction but in the matter of using injunctions to restrict it.

Where a Federal law applies in the Territory any exceptions to that Federal law limit the impact of that Federal law in its application in the Territory—but such exceptions do not restrict the power of the Territory with respect to matters of local law. The same is true whether the Federal law under consideration is the Sherman Act or any other Federal legislation.

An intent on the part of Congress thus to limit the normal police powers of the Territory is not lightly to be assumed. See decisions cited ante, pp. 23-26.

That the substantive provisions of sec. 20 operate only in the field of Federal law is assumed by the United States Supreme Court. In *Allen-Bradley Co. v. United States*, (1945) 325 U. S. 797, 807, 89 L. ed. 1939, 1947, the court referred to the specific acts listed in sec. 20 as having been declared by sec. 20 "not to be violations of Federal law."

It should be noted that the *Hutcheson* decision arose out of a criminal prosecution under the Sherman Act. Where, therefore, the decision refers to "allowable conduct", it means conduct which is not in violation of the Sherman

Act,—i.e., conduct which is excluded from the Sherman Act by reason of the provisions of sec. 20 and sec. 4.

It is a necessary conclusion therefore that, although sec. 20 and sec. 4 are applicable within the Territory as limitations on the effect in the Territory of the Sherman Act (and other Federal legislation), they are not applicable as limiting the Territorial government including the Territorial courts with respect to matters of local law.

We have already pointed out that if sec. 20 operates to limit the Territorial government including the Territorial courts, then “terminating any relation of employment” could not be in violation of Territorial law—with the result that in case any employer violated a contract of employment by discharging an employee contrary to the terms of the contract the employee would not be able to obtain redress in a Territorial court. We wish to point out two further examples of the unfortunate results which would follow if the position of appellants were accepted.

The first is illustrated by the decision of the United States Supreme Court in *Apex Hosiery Co. v. Leader*, (1940) 310 U. S. 469, 84 L. ed. 1311. The case involved a suit brought in a Federal District Court by a corporation against a labor organization and its officers to recover treble damages under the Sherman Act for alleged conspiracy in restraint of trade or commerce among the several states. The plaintiff was a corporation which operated a hosiery factory in Philadelphia. Most of its raw materials were shipped to it in interstate commerce and a substantial part of its products were sold in interstate commerce. In order to unionize the hosiery factory, the labor organization and its officers and members forcibly took possession of the factory and held it during a protracted “sit-down” strike, during which they injured and destroyed much of the factory equipment and machinery. The Supreme Court held that the plaintiff could not recover damages under the Sherman Act because the above described action of the

union and its officers and members did not involve any violation of the Sherman Act. The rule therefore is that where, in order to unionize a factory, a labor organization and its officers and members forcibly take possession of a factory and hold it during a "sit-down" strike and injure and destroy factory equipment and machinery—such acts cannot be considered or held to be violations of the Sherman Act.

Let us examine the effect in the Territory of the rule just stated—if the position of appellants is accepted. It is their position that the Sherman Act and its amendatory Acts are applicable within the Territory and therefore that any acts which are not in violation of the Sherman Act as amended by its amendatory Acts also cannot be in violation of Territorial law. They take this position with respect to the acts specified in sec. 20 of the Clayton Act and sec. 4 of the NLGA. But there cannot be any distinction between acts which are specified by statute to be not in violation of the Sherman Act and acts which are specified by the United States Supreme Court to be not in violation of the Sherman Act. If, under any theory of the exercise of "plenary power", the Sherman Act and its amendatory Acts operate to limit the Territorial government including the Territorial courts, they must do so as a whole—as interpreted by the Federal courts as well as interpreted by act of Congress. The effect of the decision in the *Apex Hosiery* case is the same as though the acts specified in sec. 20 and sec. 4 had in express terms included trespass in labor disputes and the injury and destruction of factory equipment and machinery in labor disputes. The opinion in the *Apex Hosiery* case recognized that such acts were illegal and that the plaintiff was entitled to redress in the courts of Pennsylvania for such illegal acts. But if the position of appellants is accepted then the same acts if committed in the Territory of Hawaii would not be illegal, because not in

violation of the Sherman Act as amended, and the victim would have no redress in the Territorial courts.

The second is illustrated by the decision of the United States Supreme Court in *United States v. Local 807*, (1942) 315 U. S. 521, 535-6, 86 L. ed. 1004, 1012. The *Local 807* case arose under the Federal Anti-Racketeering Act of 1934, (48, Stat. 979-980). (The act was amended out of existence in 1946, with the result that its provisions do not now appear in the United States Code). The Act provided in part as follows, in Sections 2 and 6 (*italic supplied*) :

2. Any person who, in connection with or in relation to any act in any way or in any degree affecting *trade or commerce* or any article or commodity moving or about to move in *trade or commerce*—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, *not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or*

6. . . . *Provided*, That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, *as such rights are expressed in existing statutes of the United States.*

Section 1 of the Act defined “trade or commerce” as including trade or commerce within the Territory of Hawaii. In this respect the language of sec. 1 of the Act is similar to the language of sec. 3 of the Sherman Act. In enacting the Act, Congress therefore acted under its “plenary power” to legislate for the Territory of Hawaii and other territories, as well as under its power to regulate interstate and foreign commerce—to the same extent as in enacting the Sherman Act and its amendatory Acts.

The *Local 807* case involved a criminal prosecution for alleged conspiracy to violate the Sherman Act and also for alleged conspiracy to violate sec. 2 (a) of the Federal Anti-Racketeering Act of 1934. The case arose out of the following facts: The members of a union of truck drivers operating in New York City were attempting to control the driving of trucks within the city. For this purpose they attempted to take over at the city limits the driving of trucks bringing merchandise to the city from points outside the city limits, including from points outside the State of New York. They also demanded and received payments from owners of such trucks of \$9.42 for each large truck and \$8.41 for each small truck, being the regular rates for a day's work in the city of driving and loading and unloading. In some instances they actually performed the work within the city, in return for the payments demanded and received. In other instances they received the payments demanded without rendering any services. There was sufficient evidence to warrant a finding that they used violence and threats to obtain the payments above referred to.

The defendants (the union and its officers and members) were convicted in the District Court of conspiracy to violate the Sherman Act and also of conspiracy to violate sec. 2 (a) of the Federal Anti-Racketeering Act of 1934. The Circuit Court of Appeals for the Second Circuit reversed the conviction under the Sherman Act, on the authority of the decision in the *Apex Hosiery* case, but affirmed the conviction under sec. 2(a) of the Anti-Racketeering Act of 1934. *United States v. Local 807*, (2 Cir., 1941) 118 F. 2d. 684. The only issue before the Supreme Court was as to the conviction under sec. 2 (a) of the Federal Anti-Racketeering Act of 1934. The Supreme Court reversed the conviction.

The Supreme Court held that the payments demanded as above set forth constituted "wages by a bona-fide employer to a bona-fide employee", within the meaning of sec. 2 (a). The Supreme Court also, (315 U. S. 535-536,

86 L. ed. 1012), referred to the provisions of sec. 6, safeguarding "the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof", and held that such rights of labor organizations included the acceptance of payments even where services are refused and even where force or threats are used. In this connection the court pointed out that the purpose of the Act was to reach the activities of predatory criminal gangs of the Kelly and Dillinger type and stated that the activities of the union and its members were "among those practices of labor unions which were intended to remain beyond its ban."

The Supreme Court pointed out however that the activities in question, although not in violation of the Federal Anti-Racketeering Act, were nevertheless not lawful. The opinion contains, (315 U. S. 536, 86 L. ed. 1012-3) the following:

This does not mean that such activities are beyond the reach of federal legislative control. Nor does it mean that they need go unpunished. The power of state and local authorities to punish acts of violence is beyond question. It is not diminished or affected by the circumstance that the violence may be the outgrowth of a labor dispute. The use of violence disclosed by this record is plainly subject to the ordinary criminal law.

The decision of the Court was that the use of violence and threats to collect wages was not in violation of the Federal Anti-Racketeering Act. The decision of the Supreme Court was furthermore that the use of violence and threats to collect wages was not in violation of *any other law of the United States*. This results from the rule that an indictment under one Federal statute will support a conviction under any Federal statute. See *Williams v. United States*, (1897) 168 U. S. 382, 42 L. ed. 509, and *United States v. Hutcheson*, 312 U. S. 219, 229, 85 L. ed. 788, 791).

We therefore had the following situation while the Fed-

eral Anti-Racketeering Act of 1934 was in force. Express exceptions to the scope of the Federal Anti-Racketeering Act of 1934 which were contained in sec. 2 (a) and in sec. 6 thereof (which exceptions are comparable to the exceptions to the scope of the Sherman Act which are contained in sec. 20 of the Clayton Act and sec. 4 of the NLGA) limited the scope of the Federal Anti-Racketeering Act so that nothing therein prohibited the use of violence and threats to collect wages. Similarly under the rule of the *Williams* and *Hutcheson* cases the use of violence and threats to collect wages was not in violation of *any law of the United States*.

Let us now examine the effect in the Territory of the rule of the *Local 807* case—if the position of appellants is accepted. Under their theory of the exercise by Congress of “plenary power,” the express exceptions in the Federal Anti-Racketeering Act to its scope would not only have limited the meaning and effect of the Act itself as applicable in the Territory but would also have limited the power of the Territory and of its courts—with the result that the use of violence and threats to collect wages could not be or become the subject of Territorial legislation or of litigation in the Territorial courts. This would be particularly true under their position, because the decision of the Supreme Court in the *Local 807* case involved a determination that the use of violence and threats to collect wages is not in violation of *any law of the United States*. We would therefore have the monstrous situation whereby violence and threats to collect wages would be in violation of the local law of New York (as pointed out by the Supreme Court in the *Local 807* decision) but would not be and could not be made in violation of the local law of Hawaii.

Of course the foregoing was not the true interpretation of the Federal Anti-Racketeering Act as applicable in Hawaii. Under the Act as applicable in Hawaii, the Act would not have been violated by the use of violence and threats to col-

lect wages in Hawaii in connection with local trade or commerce any more than it was violated by the use of violence and threats to collect wages in New York in connection with interstate trade or commerce. But the fact that such violence and threats in Hawaii would not have been in violation of the Act as applicable in Hawaii would not have meant that such violence and threats were not the legitimate subject of redress in the Territorial courts.

A similar situation exists with respect to the interpretation of sec. 20 of the Clayton Act and sec. 4 of the NLGA, as imposing specific limitations upon the scope of "any law of the United States". Under sec. 20 and sec. 4 no law of the United States would be violated by any action in Hawaii in "terminating any relation of employment" in Hawaii or in performing any other of the specified acts listed in sec. 20 and sec. 4. But such fact does not limit the local law of the Territory with respect to the specified acts and does not limit the powers of the Territorial courts in enforcing local law with respect to the specified acts.

It is the contention of appellants that if their position is not accepted then there will be a different Sherman Act and a different Clayton Act and a different Norris-LaGuardia Act in Hawaii than anywhere else in the United States. (Op. Br. 65-66, 81). Such is not the case. A difference would exist if appellants' position were accepted. In Pennsylvania, the local law including the local courts can deal with trespass in labor disputes and with injury and destruction of factory equipment and machinery in labor disputes. In any state the local law including the local courts can deal with unlawful picketing. In New York, local law including the local courts could during the existence of the Federal Anti-Racketeering Act of 1934 deal with the use of violence and threats to collect wages. Appellants would have the local law including the local courts in Hawaii helpless to deal with the foregoing.

It is our position that the impact of the substantive rights

under sec. 20 of the Clayton Act and sec. 4 of the NLGA are the same in the Territory as they are in a State. They operate as exceptions to the Federal Anti-Trust Act (and other Federal legislation) but do not restrict the powers of local governments including local courts in normal matters of local law. See, also, *Alesna v. Rice* (U.S.D.C. Haw., Dec. 4, 1947) quoted in Appendix C, p. xxi.

C. The Term "Law of the United States" as Used in the Last Clause of Section 20 of the Clayton Act, not only has a Well-Defined Meaning Which Excludes Law of a Territory, but also, as Congress Itself Has Defined that Term with Particular Reference to Territories, Excludes the Law of a Territory.

In support of their contention that the Norris-LaGuardia Act confers substantive rights, appellants rely upon the last clause of sec. 20 of the Clayton Act as construed in the *Hutcheson* case *in pari materia* with the Norris-LaGuardia Act, reading:

. . . nor shall any of the acts specified in this paragraph be considered or held to be violations of *any law of the United States*. (Emphasis added.)

We have already shown ante, pp. 69-71, that the history of this section conclusively indicates that it referred to Federal law, not territorial law. However, we will show also that the term "law of the United States" had a well-defined meaning both before and after the Clayton Act was passed, under the decisions of the Federal courts, and that this meaning excluded the law of a Territory.

Decisions Defining "Law of the United States"

In *Maxwell v. Fed. Gold & Copper Co.* (8 Cir., 1907) 155 F. 110, 112, a suit was brought by a citizen of Minnesota in a Federal district court in that State against a corporation organized under the laws of the Territory of Arizona, for conversion of stock. The district court ruled that there was no diversity of citizenship because the parties were not citizens of different States. To the contention, which the dis-

strict court had also denied, that the defendant was a corporation organized under the statutes of the Territory of Arizona, and that the laws of territories are "laws of the United States" because they are subject to nullification by Congress, and that, therefore, the case involved and arose under a "law of the United States" within the purview of the decisions in *Union Pac. Ry. Co. v. Myers*, (1885) 115 U. S. 1; 29 L. ed. 319; *Tex. & Pac. Ry. Co. v. Cox*, (1892) 145 U. S. 593, 36 L. ed. 829, and *U. S. Freehold, etc. Co. v. Gallegos*, (8 Cir., 1898) 89 F. 769, the Court of Appeals for the Second Circuit said:

... But the laws of the territories are not laws of the United States,

citing *Ex parte Moran* (8 Cir. 1906) 144 F. 594, 603; *Linford v. Ellison* (1894) 155 U. S. 503, 508, 39 L. ed. 239, 241; and *Maricopa & Phoenix Ry. v. Arizona* (1895) 156 U. S. 347, 351, 39 L. ed. 447, 448.

In *Union Pac. R. Co. v. Myers* cited in the *Maxwell* case supra, the court held that a suit brought in a State court against a corporation organized under a statute of the United States could be removed by such corporation to the Circuit Court of the United States on the ground among others that the fact that it was created by Act of Congress made the suit one of the "suits arising under the laws of the United States" within the meaning of the second section of the Act of Mar. 3, 1875. The same rule was reiterated in the *Cox* and *Gallegos* cases. If a law of a Territory was also a "law of the United States", the fact of such incorporation under a law of the Territory ought to have the same result. But it was held to the contrary, in the *Maxwell* case supra.

In *Ex parte Moran*, cited in the *Maxwell* case supra (8 Cir. 1906) 144 F. 594, where Moran applied to the Federal court for his release on habeas corpus, on the ground that the statutes of the Territory of Oklahoma had been violated in the drawing of the grand jury which indicted him and therefore his conviction was void, while assuming that,

if the objections had been seasonably made and the judgment reviewable on writ of error, there might have been a reversal, the court said, at page 603, in denying the writ:

. . . The grounds upon which a prisoner in jail may be discharged by the use of this writ are specified in sec. 753 of the Revised Statutes, and the only ones possibly applicable to this case are the petitioner "is in custody in violation of the constitution or of a law or treaty of the United States." No treaty is broken by his confinement. The laws of the Territory are not laws of the United States, and their violation or disregard in the selection of the grand jury and the trial upon an indictment found by disqualified jurors was not an infraction of any national law. . . .

It has even been held that an Act of Congress peculiarly local to the District of Columbia is not a "law of the United States" within the meaning of a Federal statute on appeals. Thus in *Amer. Security & Trust Co. v. Comrs. of D. C.* (1912) 224 U. S. 491, 56 L. ed. 856, where sec. 250 of the Judicial Code (since repealed) provided that any final judgment or decree of the Court of Appeals of the District of Columbia might be reviewed, etc., in certain cases, one of them being:

Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, . . .

the court held that, in view of the purpose of Congress to relieve the Supreme Court from indiscriminate appeals, a special law applicable locally to the District of Columbia only, was not a "law of the United States" within the meaning of the quoted clause. The same ruling was reiterated in *Wash. Alexandria & Mt. Vernon Ry. Co. v. Downey* (1915) 236 U. S. 190, 59 L. ed. 533, where a *general* law enacted by Congress intended to be applicable generally throughout the United States, but which had been held unconstitutional

as to all localities except the District of Columbia, was held to be thereby constituted a local law and not a "law of the United States" for purposes of appeal under sec. 250 of the Judicial Code *supra*.

Coming now to a case decided after the passage of both the Clayton and Norris-LaGuardia Acts, the case of *People of Puerto Rico v. Rubert Hermanos, Inc.* (1940) 309 U. S. 543, 84 L. ed. 916, is pertinent. It was there held that the provision of sec. 39 of the Organic Act of Puerto Rico restricting every corporation authorized to engage in agriculture to the ownership and control of not to exceed 500 acres of land, is not one of the "laws of the United States" within the purview of sec. 256 of the Judicial Code (28 USCA 371) which vests in the courts of the United States exclusive of the several states jurisdiction of all suits "for penalties and forfeitures incurred under the laws of the United States", so as to exclude from the jurisdiction of the Puerto Rican territorial courts proceedings against the corporation under a territorial statute providing remedies for violations of such restriction. Mr. Justice Frankfurter, in discussing the question, said (84 L. ed. 919-920) :

There remains for consideration an objection based on § 256 of the Judicial Code (28 U.S.C.A., § 671). That section vests in "courts of the United States exclusive of the courts of the several States" jurisdiction of all suits "for penalties and forfeitures incurred under the laws of the United States". Whether a law passed by Congress is a "law of the United States" depends on the meaning given to that phrase by its contents. A law for the District of Columbia, though enacted by Congress, was held to be not a "law of the United States" within the meaning of § 250 of the Judicial Code. *American Security and Trust Company vs. District of Columbia*, 224 U. S. 491. Likewise, we hold that § 39 of the Organic Act is not one of "laws of the United States" within the meaning of § 256. Sec. 39 is peculiarly concerned with local policy calling for local enforcement from which local courts should not be ex-

cluded by a statutory provision plainly designed for the protection of policies having general application throughout the United States.

If, therefore, the term "law of the United States" in a general Federal statute affecting jurisdiction or procedure of Federal courts, can at times be construed, as in the *American Security* and *Rubert Hermanos*, *supra*, not even to include Federal laws where the latter are peculiarly local to a Territory or the District of Columbia, the inclusion of laws of a Territory enacted by its local legislature in the operation of such a general statute without express and specific language to that effect would be pure judicial legislation. And accordingly, the Federal courts, as in the *Maxwell* and *Moran* cases, *supra*, have refused to so hold.

Where, therefore, sec. 20 of the *Clayton Act* provides that certain defined acts of persons involved in labor disputes shall not be "considered or held to be violations of any law of the United States", clearly, the substantive effect, if any, of such a general enactment, cannot be held to apply to purely local laws enacted by a Territorial legislature, or to the general or common law of the Territory as defined by its courts.

But it is not necessary even to resort to the foregoing decisions to prove the correctness of this proposition, as the next subtitle will show.

Distinction between "Law of the United States" and "Law of Hawaii" or "Law of a Territory" Recognized Expressly by Federal Legislation, Including the Clayton and Sherman Acts, and the Hawaiian Organic Act.

Congress itself has, by its own use of the term "law of the United States", excluded laws of a Territory from the purview of such a term. Thus, in the very definitions cited by appellants from the Clayton Act (Op. Br. 64) as well as in the Sherman Act, defining "person", Congress itself has dis-

criminated between the term "law of the United States" and "laws of a Territory".

The word "person", or "persons", wherever used in sections 1-7 and 15 of this title shall be deemed to include corporations and associations existing under or authorized by the *laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.*

Sherman Act, sec. 8; 15 USCA 7.

This distinction has been reinforced as lately as 1937, by the Act of Congress of Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693, amending sec. 1 of the Sherman Act (15 USCA 1), which now provides (emphasis added) :

Every contract, combination . . . is hereby declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal contracts . . . when contracts . . . of that description are lawful as applied to intrastate transactions, under any *statute, law* or public policy now or hereafter in effect in any *State, Territory, or the District of Columbia*

In the Clayton Act, also, sec. 20 of which (29 USCA 52) is relied upon so vehemently by appellants as conferring alleged substantive rights through the reasoning of the *Hutcheson* case, sec. 1 (now 15 USCA 12) provides, in its original form (emphasis added) :

The word "person" or "persons", wherever used in this Act, [which would include section 20, of course] shall be deemed to include corporations and associations existing under or authorized by the *laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.*

This demonstrates conclusively from the terms of the Clayton Act itself, that the law of a Territory is not included in the term "law of the United States" used in sec. 20.

More specifically, for express distinction between laws of

the United States and the Laws of Hawaii or of the Territory of Hawaii, we again refer the court to the Report of the Hawaiian Commission (Appendix B), remarks of Sens. Cullom and Morgan (Appendix D-1); also to the following sections of the Hawaiian Organic Act:

Sec. 1, defining "laws of Hawaii" (ante, p. 15); sec. 5, on the other hand, extending to Hawaii all "laws of the United States" not locally inapplicable (ante, p. 15); sec. 6, continuing in effect, with certain exceptions, the "laws of Hawaii" not inconsistent with the Constitution or "laws of the United States" (ante, p. 17); sec. 55, extending legislative power (which is nothing more than to make "laws of Hawaii") to the local legislature over all rightful subjects of legislation not inconsistent with the Constitution and "laws of the United States" locally applicable (ante, p. 18); sec. 81, continuing in effect, until the local legislature otherwise provides, the "laws of Hawaii" concerning the several courts and their jurisdiction and procedure (ante, p. 18); and sec. 83, continuing in effect, with certain qualifications, the "laws of Hawaii" relative to the judicial department (ante, p. 18).

In the face of the foregoing history of Hawaii and its Organic Act, the judicial construction of the term "law of the United States" to exclude law of a Territory, and the *express* recognition by Congress (not only in the Organic Act, but in the very Sherman and Clayton Acts upon whose terms appellants rely so insistently for their contention that the NLGA confers "substantive" rights) of the mutual exclusiveness of the terms "law of the United States" and "law" of a Territory—the argument as to such substantive rights evaporates completely.

D. Section 20 of the Clayton Act (Other Than the Last Clause) and All of the NLGA Provisions Are Procedural Only and Congress Designedly Refrained from Legislating As to Substantive Rights...

We have shown that by the last clause of section 20 of the Clayton Act as amended by implication by section 4 of the NLGA Congress merely created exceptions to the Sherman Anti-Trust Act, and that the existence of such exceptions is wholly immaterial in this case.

By the Sherman Act Congress in 1890 had created new substantive rights, operating in the field of interstate commerce, including, in a territory, intrastate commerce as well. In framing the NLGA Congress carefully considered whether it would (1) confine itself to a narrowing of (a) the Sherman Anti-Trust Act and (b) the jurisdiction and equity powers of federal courts in cases coming before them under the Sherman Act or under some other grounds of federal jurisdiction; or (2) attempt to create still further substantive rights, this time in the field of labor disputes, as a positive aid to labor (as distinguished from mere relief from the operation of existing federal laws), thereby *further increasing* federal jurisdiction over labor disputes, instead of limiting it.

Congress elected the first alternative and deliberately rejected the second. This is so clearly shown by the legislative history as to be beyond dispute. Apellants are endeavoring to have this court do what Congress decided not to do.

Congress decided not to adopt the second alternative, because of its fear of constitutional difficulties in the several states, particularly in view of the Tenth Amendment. We concede that these constitutional difficulties do not exist in a territory. Nevertheless, Congress was not thinking of the territories, was not legislating for them, and a different law cannot be framed by judicial legislation just because Congress, if it had been thinking of the territories and had been legislating for them, could have enacted a law along different lines for them—could have created new substantive rights in the field of labor disputes and could have further increased federal jurisdiction over labor disputes instead of limiting it.

Besides other excerpts quoted in this brief from the committee reports and debates on the Norris-LaGuardia Act, which without exception point to the Federal courts as the only ones under consideration and whose jurisdiction and powers were intended to be affected, we have set forth, with necessary explanatory remarks, in Appendix D-8, pp. lviii-lxix, other excerpts from or references to Prof. Frankfurter's writings and the committee reports and debates on, and the history of, the NLGA, all of which corroborate the same intent, and further clearly indicate that Congress deliberately drafted the Act as a procedural measure only and so intended it.

That Congress, by the NLGA, did not invade the field of substantive local law, and refrained from any attempt to enlarge the federal jurisdiction by placing labor disputes, as such, within the protection of the federal courts, has been recognized in the decisions.

In *Lauf v. Shinner* (1938) 303 U. S. 323, 327, 82 L. ed. 872, 876, the court per Roberts, J., said:

As the acts complained of occurred in Wisconsin the *law of that State governs the substantive rights* of the parties. But the *power of the court to grant the relief prayed depends upon the jurisdiction conferred upon it by the statutes of the United States.* (Emphasis added.)

The *Lauf* case was cited in *Brown v. Coumanis* (5 Cir. 1943) 135 F. 2d. 163, 146 A.L.R. 1241. In that case an employer brought suit for an injunction restraining defendants, a labor union and its members, who did not represent plaintiff's employees but who demanded that plaintiff sign a closed shop contract with the defendants, from interfering with the plaintiff's restaurant business. It was held that this case involved a labor dispute within the definition of the NLGA, but that such fact did not give the federal district court jurisdiction on the asserted ground that the action "arose under the laws of the United States". The court said

that the NLGA does not put within the protection of the federal courts all labor disputes—that the purpose of the NLGA

. . . is not to enlarge federal jurisdiction, but, in the matter of using injunctions, to restrict it. It extends and supplements the restrictions first imposed by Sec. 20 of the Clayton Act, 29 U.S.C.A. § 52; *United States v. Hutcheson*, 312 U.S. 219 . . . *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U.S. 91 . . . The language is everywhere negative—"No court of the United States . . . shall have jurisdiction". Secs. 101, 107, "No restraining order or injunctive relief shall be granted." Secs. 108, 109. It is argued that these negative provisions are followed by "except", or like provisions, which imply that jurisdiction is given and injunctive relief may be granted if the stated conditions are met. These conditions are mainly procedural, and do not enlarge the court's jurisdiction over controversies. The Norris-LaGuardia Act does not vest power in a court of the United States to do anything it could not previously have done. It merely denies power to do by injunction some things the courts had been doing. A suit does not arise under that Act because the petitioner asserts that the Act will affect its trial, and professes his willingness to conform to it. In order to generate this kind of federal jurisdiction a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action".

Brown v. Coumanis, *supra*, disposes of appellants' contention that the federal courts have exclusive jurisdiction in labor disputes. (Op. Br. 89).

CONCLUSION

Having demonstrated, as we believe, that the decision of the Territorial Supreme Court was correct on the only point actually involved and decided—namely, that a circuit court of the Territory is not a "court of the United States" within the purview of the Norris-LaGuardia Act, and that

therefore that Act was not applicable to the Second Circuit Court of the Territory which had jurisdiction to proceed as it did in the injunction suit with regard to which the writ of prohibition was sought—we respectfully submit that the decision of the court below should be affirmed.

Dated: Honolulu, T. H., this 10th day of December, 1947.

Respectfully submitted,

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Maui Agricultural Company, Limited.

VITOUSEK, PRATT & WINN, *of Counsel.*

APPENDIX

APPENDIX A

(See Brief, pp. 2, 26)

Sections of Territorial Statutes Relating to Jurisdiction, Powers and Procedure of Territorial Courts Referred to in Foregoing Brief.

CHAPTER 1.

COMMON LAW, STATUTES AND DEPOSITORIES.

Sec. 1. *Common law applies except when.* The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; *provided*, however, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory. [L. 1892, c. 57, s. 5; am. L. 1903, c. 32, s. 2; R. L. 1925, s. 1; R. L. 1935, s. 1.]

CHAPTER 188.

SUPREME COURT.

Sec. 9603. *Superintendence of inferior courts.* The supreme court shall have the general superintendence of all courts of inferior jurisdiction, to prevent and correct errors and abuses therein where no other remedy is expressly provided by law. [L. 1892, c. 57, s. 50; R. L. 1925, s. 2223; R. L. 1935, s. 3592.]

Sec. 9604. *Jurisdiction and powers.* The supreme court shall have appellate jurisdiction to hear and determine all questions of law, or of mixed law and fact, which shall be properly brought before it on exceptions, error or appeal duly perfected from any other court, judge, magistrate or tribunal, according to law, or by reservation of any circuit court or judge; and original jurisdiction in all questions arising under writs of error, certiorari, mandamus, prohibi-

tion and injunction directed to circuit courts, or to circuit judges, or to magistrates, or other judicial tribunals, and returnable before the supreme court. The supreme court and the several justices thereof in aid of the appellate jurisdiction of the court shall have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of the appellate jurisdiction of the court, and each of the justices shall have original jurisdiction and power to issue writs of habeas corpus and may make such writs returnable before himself or the supreme court or before any circuit court or any judge thereof. [L. 1892, c. 57, s. 51; R. L. 1925, s. 2224; R. L. 1935, s. 3593.]

Sec. 9605. *Same.* The supreme court and the several justices thereof shall have power to administer oaths and to issue or allow the issuance of writs of error, certiorari, mandamus, prohibition and injunction according to law, to circuit courts, circuit judges, district magistrates and other judicial tribunals and to parties litigant before such courts, judges, magistrates, and tribunals; all of which writs shall be returnable before the supreme court. [L. 1892, c. 57, s. 53; am. L. 1903, c. 32, s. 14; R. L. 1925, s. 2225; R. L. 1935, s. 3594.]

Sec. 9606. *Incidental powers.* The supreme court shall have power to compel the attendance of witnesses and the production of books, papers and accounts; to make and award all such judgments, decrees, orders and mandates; to issue all such executions and other processes, and to do all such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it. [L. 1892, c. 57, s. 52; R. L. 1925, s. 2226; R. L. 1935, s. 3595.]

CHAPTER 189.

CIRCUIT COURTS.

JURISDICTION AND POWERS; VENUE.

Sec. 9647. *Circuit courts.* The several circuit courts shall have jurisdiction, subject to appeal and exceptions to the supreme court according to law, as follows:

1. Of all criminal offenses cognizable under the laws of the Territory, committed within their respective circuits or transferred to them for trial by change of venue from some other circuit court;

2. Of all suits for penalties and forfeitures incurred under the laws of the Territory;

3. Of all causes, civil or criminal, that may properly come before them on appeal from any other court according to law;

4. At law, without jury, of all proceedings in, or in the nature of, quo warranto, brought by or in the name of the public utilities commission, or the Territory, for the forfeiture of the franchise of any corporate body offending against the provisions of any law relating to such corporation, for misuser, for nonuser, for doing or committing any act or acts amounting to a surrender of its charter, and for exercising rights not conferred upon it;

5. Of all civil causes at law, except as otherwise expressly provided;

6. Any circuit court may, upon satisfactory proof that a fair and impartial trial cannot be had in any case pending in such court, and after the parties thereto shall have had opportunity to be heard, change the venue to some other circuit and order the record to be transferred thereto; *provided*, however, that any circuit court may, in its discretion, upon the consent of all the parties to any civil cause pending in such court, change the venue to some other circuit court and order the record to be transferred thereto. [L. 1892, c. 57, s. 36; am. L. 1903, c. 32, s. 10; am. L. 1921, c. 157, s. 1; R. L. 1925, s. 2247; R. L. 1935, s. 3643.]

Sec. 9648. *Circuit judges at chambers.* The judges of the several circuit courts shall have power at chambers within their respective jurisdictions, but subject to appeal to the circuit and supreme courts, according to law, as follows:

1. To hear and determine all matters in equity; [see cc. 294, 302-304, 306].

2. To hear and determine all matters of divorce, separation and annulment of marriage; [see c. 296].

3. To grant probate of wills, to appoint administrators and guardians, and to compel executors, administrators and guardians to perform their respective trusts and to account

in all respects for the discharge of their official duties; to remove any executor, administrator or guardian; to determine the heirs at law of deceased persons and to decree the distribution of intestate estates; [see cc. 290-292, 295, 305].

4. To admeasure dower and curtesy and partition real estate; when the dower or curtesy in real estate cannot be set apart without great injury to the owners, the judge may ascertain the value of such dower or curtesy in money, and order the same to be paid on such terms as shall be just and reasonable; when the partition of real estate cannot be made without great prejudice to the parties, the judge may order a sale of the premises and divide the proceeds; [see cc. 292, 304].

5. To legalize the adoption of children and to decree the affiliation of bastards; [see cc. 298, 299].

6. To select and impanel, subject to challenge for cause, by either party, a special jury of inquiry of idiocy, lunacy, or de ventre inspiciendo, or in any other matter to be tried before any of the judges at chambers, and they shall receive and act upon the verdict of such jury as equity and good conscience require; [see cc. 69, 195, 205, 233, 305].

7. To issue writs of habeas corpus according to law; [see c. 214].

8. To issue writs of error, certiorari, mandamus, prohibition and quo warranto, and all other writs and processes, according to law, to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice and the regular execution of the law; [see cc. 183, 211].

9. To enlarge on bail persons rightfully confined in all bailable cases; [see c. 231].

10. To require either the plaintiff or defendant, upon the application of the opposite party, to give *security for costs* in any civil cause, upon such terms and conditions as the judge shall deem just;

11. To issue warrants for the apprehension, in any part of the Territory, of any person accused under oath of a crime or misdemeanor committed in any part of the Territory and to examine and commit such person to prison according to law, for trial before the circuit court of the circuit in which the offense was committed, to fix bail and generally to per-

form the duties of a committing magistrate. [L. 1892, c. 57, s. 37; am. L. 1903, c. 32, s. 11; am. L. 1915, c. 99, s. 1; R. L. 1925, s. 2248; am. L. 1929, c. 18, s. 1; R. L. 1935, s. 3644.]

Sec. 9649. *At chambers, hearings without circuit.* Upon consent of all the parties who have appeared in any equity, probate or ex parte proceeding of any nature before any circuit judge in chambers, the circuit judge may in his discretion hold hearings in such proceeding, at which witnesses may be heard and evidence adduced and argument presented, at any place within the Territory without the boundaries of his circuit with the same effect as within the boundaries of his circuit, and for the purpose of such hearings may use the services of the clerk and reporter of the circuit court of the circuit within which such hearings are held, and may require stipulations between the parties as to the payment of costs of transportation and other special costs arising out of the fact that such hearings are held without the boundaries of his circuit as a condition of holding such hearings. [L. 1941, c. 243, s. 1.]

Sec. 9650. *No jury at chambers; exception.* Matters in the jurisdiction of judges of the circuit courts in chambers, as set forth in section 9648, shall be determined by the judge having jurisdiction thereof, without the intervention of a jury, except as provided in the sixth division of said section. [L. 1892, c. 57, s. 40; R. L. 1925, s. 2250; R. L. 1935, s. 3646.]

Sec. 9651. *Limitations. Provided,* however, that the power and jurisdiction of circuit courts and circuit judges in chambers relating to causes of a civil nature as defined in sections 9647-9648, shall be limited as follows:

1. Causes described in the second division of section 9647 shall be triable only in the circuit where it is alleged the penalty or forfeiture was incurred;

2. Actions of ejectment, actions to quiet title in real property and actions of trespass quare clausum fregit shall be triable only in the circuit in which the real property in question is situated;

3. Causes of divorce, separation, and nullity of marriage, shall be triable only in the circuit where the parties last lived together as man and wife, or, if they have not last so lived together in the Territory, in the circuit in which the applicant resides;

4. Proceedings for the probate of wills, for the appointment of administrators and trustees of the estates of deceased persons, for the admeasurement of dower and for all matters relating to the administration and settlement of estates of deceased persons, shall be brought only in the circuit where the deceased had his last domicile; *provided*, that if the deceased was last domiciled without the Territory, the proceedings may be brought in any circuit in which there is estate to be administered;

5. Proceedings for the appointment of guardians and for all matters concerning the relation of guardian and ward, shall be brought in the circuit in which the person or a majority of such persons are domiciled, in whose behalf such proceedings are begun; *provided*, that if such person is domiciled without the Territory, or a majority of such persons are so domiciled, the proceedings may be brought in any circuit in which there is estate of such person or persons;

6. Proceedings for the partition of real estate shall be brought only in the circuit where the real estate, partition of which is prayed for, is situated; *provided*, that if such real estate lies in more than one circuit the proceedings may be had in any circuit court in which the same or any part thereof is situated;

7. Proceedings for legalizing the adoption of children and decreeing the affiliation of bastards, shall be brought in the circuit in which the child, the parents, or either of them, of the children in question reside; *provided*, that if, in case of adoption, such parents are deceased or if neither of them resides within the Territory the proceedings may be brought in the circuit in which the adopting parent or parents or child reside;

8. The power of issuing writs of error and other writs specifically named in the eighth subdivision of section 9648 shall be in the judge of the circuit in which the alleged occasion for relief by any such writ shall arise; *provided*, however, that in case any such writ shall be necessary in the prosecution or furtherance of any cause or proceeding already begun or pending before any circuit court or judge, the power of issuing such writ shall be in the court or judge before whom such case or proceeding has been begun or is pending, even though the alleged occasion for relief shall

have arisen in another circuit. [L. 1892, c. 57, s. 38; am. L. 1898, c. 56, s. 1; am. L. 1903, c. 32, s. 12; R. L. 1925, s. 2249; R. L. 1935, s. 3645.]

Sec. 9652. *Circuit courts, powers.* The several circuit courts shall have power to compel the attendance of parties and witnesses from any part of the Territory, to compel the production of books, papers and accounts, to make and award all such judgments, decrees, orders and mandates, to issue all such executions and other processes, and to do all such other acts, and to take all other steps necessary to carry into full effect all the powers which are or may be given to them by law, or which may be necessary for the promotion of justice in matters pending before them. [L. 1892, c. 57, s. 42; R. L. 1925, s. 2251; R. L. 1935, s. 3647.]

Sec. 9653. *Circuit judges, powers.* The several circuit judges shall have power to administer oaths, and to compel the attendance of parties and witnesses from any part of the Territory, and the production of books, papers and accounts, to make and award all such judgments, decrees, orders and mandates, to issue all such executions and other processes, and to take all other steps necessary for the promotion of justice in matters pending before them in chambers, and to take all other steps necessary to carry into full effect all the powers which are or may be given them by law, in like manner as the circuit courts may do in term time. [L. 1892, c. 57, s. 43; R. L. 1925, s. 2252; R. L. 1935, s. 3648.]

REPORTS AND RULES.

Sec. 9660. *Power to make and revise.* The judges of the several circuit courts, with the approval of the supreme court, shall have power to make, promulgate, and from time to time revise and amend rules for regulating the practice and conducting the business of the circuit courts and circuit judges at chambers of and in the several judicial circuits, in all matters not expressly provided by law; *provided* that in no case shall such rules purport to impose costs not expressly authorized by statute. [L. 1892, c. 57, s. 41; am. L. 1913, c. 40, s. 1; R. L. 1925, s. 2259; R. L. 1935, s. 3656.]

CHAPTER 204.

CIVIL ACTIONS, GENERALLY.

RESTRAINING ORDERS.

Sec. 10050. *Petition; unliquidated demands.* In all cases contemplated by section 10033, the plaintiff may, according to circumstances, include in his petition, an allegation that the defendant is secreting his property, or disposing of the same, or colluding so to do, or is about to depart the Territory, or is damaging or wasting such property, and thereupon ask for process of attachment, or injunction, against the defendant, as such plaintiff may judge proper to ask in the premises. [C. C. 1859, s. 1117; R. L. 1925, s. 2333; R. L. 1935, s. 4068.]

Sec. 10051. *Same; ejectment.* In cases of ejectment, under section 10034, the plaintiff may, according to circumstances, allege in his petition, that there is danger that the defendant or some one for him, will commit destruction of tenements or other property, on the premises in controversy pendente lite, and thereupon ask for process of injunction, or other restraining process of the court, as such plaintiff may judge proper to ask. [C. C. 1859, s. 1119; R. L. 1925, s. 2334; R. L. 1935, s. 4069.]

Sec. 10052. *Allowance of restraining order; bond.* In every case in which process of constraint to the property of a defendant is prayed for, no such process shall issue until the plaintiff, or some one on his behalf, shall have filed a bond conditioned for the reimbursement to the defendant of all costs, charges and damages sustained by him in consequence of the suit, in case the plaintiff fail to sustain his action. Upon the filing of the petition and bond, any judge of the court at chambers may sanction a constraining writ, by indorsing thereon his written allowance, without which no executive judicial officer shall be justified in the seizure, attachment, removal, detention or injunction of his property, real or personal. [C. C. 1859, s. 1120; R. L. 1925, s. 2335; R. L. 1935, s. 4070.]

Sec. 10053. *Hearing before allowance.* If the judge deem it proper that the defendant, or any of several defendants,

should be heard before granting an injunction, he may grant an order requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may in the meantime be restrained. [C. C. 1859, s. 1121; R. L. 1925, s. 2336; R. L. 1935, s. 4071.]

PROCESS.*

Sec. 10057. *Summons returnable when.* In all actions commenced in the circuit courts the original summons shall be returnable to the term pending immediately after the expiration of twenty days after the service of summons; *provided*, however, if no term be pending at such time then the summons shall be returnable to the next succeeding term. [L. 1905, c. 8, s. 1; R. L. 1925, s. 2340; R. L. 1935, s. 4075.]

CHAPTER 211.

EXTRAORDINARY LEGAL REMEDIES.

PROHIBITION.

Sec. 10270. *Definition.* This is a mandate which issues in the name of the Territory from the supreme court, or from any justice thereof, or a circuit judge, directed to the judge and the party suing in any inferior court, forbidding them to proceed any further in the cause, on the ground that the cognizance of such cause does not belong to such court, or that the cause or some collateral matter arising therein is beyond its jurisdiction, or that it is not competent to decide it. [L. 1876, c. 39, s. 15; R. L. 1925, s. 2695; R. L. 1935, s. 4249.]

Sec. 10271. *Petition.* The defendant who applies for this writ shall apply by petition addressed to the justices of the supreme court, or to any single justice thereof, or to a circuit judge, stating the cause and nature of the action brought against him, and showing that the inferior court is not competent to try it, or that it has exceeded its jurisdiction in the trial or hearing of such action, which petition shall be verified by the oath of the applicant or by some person on

his behalf cognizant of the facts. [L. 1876, c. 39, s. 16; R. L. 1925, s. 2696; R. L. 1935, s. 4250.]

Sec. 10272. *Issuance of writ.* The court, justice, or judge, if sufficient ground is shown, shall issue an order forbidding the judge to take cognizance of the cause, and forbidding the plaintiff or party prosecuting to prosecute it further. [L. 1876, c. 39, s. 17; R. L. 1925, s. 2697; R. L. 1935, s. 4251.]

Sec. 10273. *Execution prohibited when.* If an inferior judge has rendered judgment in any of the cases before mentioned and the execution has issued, the order may be directed as well to the plaintiff or party prosecuting as to the officer charged with the execution, forbidding them to proceed in the execution in the same manner as if the prohibition had been addressed to the judge before issuing the execution. [L. 1876, c. 39, s. 20; R. L. 1925, s. 2700; R. L. 1935, s. 4252.]

Sec. 10274. *Service.* The order may be served in like manner as provided in section 10269 with respect to the writ of mandamus. [L. 1876, c. 39, s. 23; R. L. 1925, s. 2703; R. L. 1935, s. 4253.]

ANSWER, PERPETUAL WRIT.

Sec. 10275. *Effect, if judge admits no jurisdiction.* When on being served with such order the inferior judge acknowledges he has no jurisdiction, he shall abstain from proceeding further in the case. [L. 1876, c. 39, s. 18; R. L. 1925, s. 2698; R. L. 1935, s. 4254.]

Sec. 10276. *Otherwise may answer; perpetual writ.* But if a judge, or the plaintiff or party prosecuting, shall believe the inferior court is competent, he or they may file a written answer to the order, after which the court or judge having jurisdiction shall pronounce summarily on the matter; and if the court or judge shall be of opinion that the applicant has made out his case, the prohibition shall be made perpetual, otherwise it or he shall allow the inferior judge to proceed to the trial and judgment of the case. [L. 1876, c. 39, s. 19; R. L. 1925, s. 2699; R. L. 1935, s. 4255.]

Sec. 10277. *Costs.* The costs shall be awarded to the parties according to the ultimate event of the application. [L. 1876, c. 39, s. 22; R. L. 1925, s. 2702.]

Sec. 10278. *Enforcement of writ.* If in contempt of the order the judge or the party shall proceed any further in the cause, the superior tribunal shall cause them to be arrested and shall punish them for such contempt, and the opposite party shall have an action for his damages against them. [L. 1876, c. 39, s. 24; R. L. 1925, s. 2704; R. L. 1935, s. 4257.]

CHAPTER 244.

CONTEMPTS.

Sec. 11140. *Defined; penalties.* Whoever, after trial by jury, is adjudged guilty of contempt of any court, whether by open resistance to the process or proceedings thereof, or of any judge or justice thereof in the lawful exercise of his judicial functions; or by insulting, contemptuous, contumelious, disrespectful or disorderly language, behavior or act, or breach of the peace, noise or other disturbance in the presence or hearing thereof when in session; or by wilful disobedience or neglect of any lawful process or order; or by refusing to be sworn as a witness, or when sworn, to answer any legal and proper interrogatories; or by publishing animadversions on the evidence or proceedings in a pending trial tending to prejudice the public respecting the same, and to obstruct and prevent the administration of justice; or by knowingly publishing an unfair report of the proceedings of a court, or malicious invectives against a court or jury tending to bring the court or jury, or the administration of justice into ridicule, contempt, discredit or odium, shall be punished by imprisonment not exceeding two years, or by fine not exceeding five hundred dollars; *provided*, however, that every judicial tribunal, acting as such, and every magistrate acting by authority of law in a judicial capacity, may summarily punish persons guilty of contempt as follows:

1. The supreme court or any justice thereof, by fine not exceeding one hundred dollars or imprisonment not exceeding sixty days, and not otherwise.

2. Any circuit court or circuit judge or board of registration, by fine not exceeding one hundred dollars or imprisonment not exceeding thirty days, and not otherwise.

3. Any district magistrate, any person acting in a judicial capacity by authority from a court of record, or any other person or tribunal having by law authority to punish for contempt, by fine not exceeding ten dollars or imprisonment not exceeding ten days, and not otherwise.

And when any person shall be committed to jail for the non-payment of any such fine he shall be discharged not later than the expiration of the time for which the court or judge or other person or tribunal imposing the fine could have sentenced him to imprisonment under the provisions of this section. [P. C. 1869, c. 29, s. 18; am. imp. L. 1872, c. 13, s. 1; am. L. 1903, c. 21, s. 1; R. L. 1925, s. 4326; R. L. 1935, s. 5740.]

Sec. 11141. *Refusal to perform act.* When the contempt consists in the omission or refusal to perform an act which is yet in the power of the party to perform, he may be imprisoned until he has performed it, and in that case the act shall be specified in the warrant of commitment. [P. C. 1869, c. 29, s. 20; R. L. 1925, s. 4327; R. L. 1935, s. 5741.]

Sec. 11142. *Publication of court proceedings.* The publication of proceedings before any court or judge, shall not be deemed to be contempt, nor shall the publication be punishable as contempt. [L. 1888, c. 42, s. 1; R. L. 1925, s. 4328; R. L. 1935, s. 5742.]

Sec. 11143. *Indictment.* Persons punished according to the provisions of section 11140 shall also be liable to indictment for the same misconduct, if it be an indictable offense; but the court before which a conviction is had on the indictment, in passing sentence, shall take into consideration the punishment before inflicted. [P. C. 1869, c. 29, s. 19; R. L. 1925, s. 4329; R. L. 1935, s. 5743.]

Sec. 11144. *Constructive contempts. Proceedings to review judgments for contempt.* Constructive contempts shall not be punishable as such except by the supreme court, the several circuit courts, and the justices and judges of said courts respectively at chambers. Whenever any person shall be adjudged guilty of any contempt or sentenced therefor, the particular circumstances of the offense shall be fully set forth in the judgment and in the order or warrant of commitment, and, on appeal, exceptions, writ of error, habeas

corpus or other proceedings for the review of the judgment, sentence or commitment, no presumption of law shall be made in support of the jurisdiction to render the judgment or pronounce the sentence or order the commitment. Every judgment, sentence or commitment for a civil contempt or for a constructive or indirect criminal contempt shall be subject to appeal, exceptions, writ of error or other proceeding for review as provided by law in other cases; *provided*, however, that on any appeal or other proceeding for review only questions of law shall be considered, and that nothing in this section contained shall be construed to prohibit the review of proceedings in any case of contempt, civil or criminal, direct or indirect, on habeas corpus or otherwise as heretofore allowed. [L. 1903, c. 21, s. 2; R. L. 1925, s. 4330; R. L. 1935, s. 5744.]

TITLE 33:

EQUITY.

CHAPTER 302.

EQUITY: JURISDICTION AND PROCEDURE.

Sec. 12401. *Circuit judges.* In addition to the jurisdiction in equity otherwise conferred, the several circuit judges shall have original and exclusive jurisdiction of every original process whether by bill, writ, petition or otherwise, in which relief in equity is prayed for, except when a different provision is made, and may issue all general and special writs and processes, required in proceedings in equity to courts of inferior jurisdiction, corporations and individuals when necessary to secure justice and equity. [L. 1878, c. 15, s. 1; R. L. 1925, s. 2462; R. L. 1935, s. 4700.]

Sec. 12402. *Same.* The several circuit judges may hear and determine in equity, all cases hereinafter mentioned, when the parties have not a plain, adequate and complete remedy at common law, that is to say:

1. Suits for redemption of mortgages or to foreclose the same.

2. Suits and proceedings for enforcing and regulating the execution of trusts, whether the trusts relate to real or personal estate.

3. Suits for the specific performance of contracts by and against either party to the contract and his heirs, devisees, executors, administrators and assigns.

4. Suits to compel the delivery of goods or chattels taken or detained from the owner and secreted or withheld so that the same cannot be replevied.

5. Suits for contributions by or between devisees, legatees or heirs, who are liable for the debts of a deceased testator or intestate and by or between any other persons respectively liable for the same debt or demand, when there is more than one person liable at the same time for such contribution.

6. Other cases in which there are more than two parties having distinct rights or interests which cannot be justly and definitely decided and adjusted in one action at the common law.

7. Suits between copartners, joint tenants and tenants in common, and their legal representatives, with authority to appoint receivers of rents and profits, and apportion and distribute the same to the discharge of incumbrances and liens on the estates or among the cotenants.

8. Suits between joint trustees, coexecutors and coadministrators, and their legal representatives.

9. Suits concerning waste and nuisance, whether relating to real or personal estate.

10. Suits upon accounts when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law.

11. Bills by creditors to reach and apply in payment of a debt, any property, right, title, or interest, legal or equitable of a debtor, within the Territory, which cannot be come at to be attached or taken on execution in a suit at law, against such debtor.

12. Cases of fraud, and conveyances or transfers of real estate in the nature of mortgages.

13. Cases of accident or mistake.

14. Suits or bills of discovery, when a discovery may be lawfully required according to the course of proceedings in equity.

15. Suits for the determination and declaration of heirs of deceased persons.

16. And shall have full equity jurisdiction, according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate and complete remedy at law. [L. 1878, c. 15, s. 2; R. L. 1925, s. 2463; am. L. 1927, c. 180, s. 1; R. L. 1935, s. 4701.]

PROCEDURE.

Sec. 12403. *Sworn bill or petition, etc.* Suits in equity shall be commenced by sworn bill or petition according to the usual course of proceedings in equity, and shall be returnable on the rule days established by the judges. The material facts and circumstances shall be stated with brevity, omitting immaterial and irrelevant matters. [Laws 1878, c. 15, s. 3; R. L. 1925, s. 2466; R. L. 1935, s. 4703; am. L. 1941, c. 258, s. 1.]

Sec. 12404. *Additional parties; unknown parties.* Where a proceeding in equity involves or concerns any property, tangible or intangible, within the jurisdiction of the court, or any legal or equitable estate, right or interest, vested or contingent, in any such property, any person having or claiming to have any legal or equitable estate, right or interest, vested or contingent, in such property or any part thereof, or any lien or incumbrance upon or affecting such property, in whole or in part, or any inchoate right of dower, not joined as a party in the bill or petition as filed, may become a party by appearing and filing answer in such proceeding, or otherwise by intervention as the judge may allow, but in no case after judgment or decree has been given and filed in the records of the clerk of the court, and may by appropriate pleading set forth the estate, right or interest, vested or contingent, claimed in such property, or lien or incumbrance asserted against the same, or the inchoate right of dower, together with any defense against the bill or petition. All persons interested in any manner or

who may claim any interest in any such property, whose names are unknown to the petitioner, may be made parties to the suit by the name and description of unknown owners or claimants, who may be designated by fictitious names, and when their true names shall become known the same may be inserted as though correctly stated in the first instance. [C. C. 1859, s. 1228; am. L. 1921, c. 45, s. 1; R. L. 1925, s. 2470; R. L. 1935, s. 4704; am. L. 1941, c. 258, s. 2.]

Sec. 12405. *Process.* Upon the filing of such petition process may issue by the clerk of the court as in actions at law unless an injunction or other temporary order is prayed for, in which case the judge shall determine, ex parte, upon the property of granting such process, and in cases not demanding secrecy or occasioning doubt, the judge may, before issuing process, grant an order to show cause, and make any interlocutory order in the matter which may appear necessary to the ends of justice. [C. C. 1859, s. 1229; R. L. 1925, s. 2471; am. L. 1925, c. 208, s. 1; R. L. 1935, s. 4705.]

APPENDIX B

(See Brief, pp. 14, 90)

REPORT OF THE HAWAIIAN COMMISSION, APPOINTED IN PURSUANCE OF THE "JOINT RESOLUTION TO PROVIDE FOR ANNEXING THE HAWAIIAN ISLANDS TO THE UNITED STATES", APPROVED JULY 7, 1898; TOGETHER WITH A COPY OF THE CIVIL AND PENAL LAWS OF HAWAII.

(Document No. 16, 55th Cong., 3d. Sess.)

REPORT OF THE COMMITTEE ON JUDICIARY

Hawaii having been hitherto a single independent State, its courts have exercised much of the jurisdiction by both the Federal and State courts in this country. In this respect the Hawaiian courts have resembled somewhat the courts of the Territories of the United States, which, as a rule, have had much Federal jurisdiction, as well as jurisdiction of cases arising under the Territorial laws. It seems very desirable in the case of Hawaii to separate these jurisdictions, leaving all cases arising under the laws of the Territory to the Territorial courts and transferring all jurisdiction of a Federal

nature to a district court of the United States to be established for the Territory of Hawaii. This district court should have also the jurisdiction of a circuit court of the United States.

There are many reasons which make this separation of jurisdictions desirable. The foreign shipping already calling at the ports of Hawaii, as well as the shipping from the United States, is very extensive and is rapidly increasing. With the natural growth of commerce on the Pacific, and especially in view of the change in the ownership of the Philippines, the near completion of the Siberian Railway, and the projected Nicaraguan Canal, the shipping that will call at the Hawaiian Islands will undoubtedly increase more rapidly in the future than it has increased in the past. This will give rise to many important admiralty cases in Hawaii, some of which may become matters of international interest.

It is obviously very desirable that jurisdiction over such cases should be exercised by Federal judges. Again, in the event of war, Hawaii may become a center for the trial of prize cases, of which the Federal courts should have exclusive jurisdiction. By making the relations between the territorial courts of Hawaii and the Federal courts, as to appeals, removal of causes, etc., the same as the corresponding relations between the State and Federal courts, all cases of a local nature can be tried and determined finally in the islands, and thus the expense and delay of bringing such cases to the mainland, and possibly to Washington, a distance of 5,000 miles, will be avoided.

Very little change need be made in the organization of the territorial or local judiciary. The organization and procedure of the Hawaiian courts is already very similar to what is found in the United States. This has been the result of a growth of sixty years of constitutional government in Hawaii under American influences. The judiciary department, unlike the executive and legislative departments, has always been free from politics. The people of Hawaii have great confidence in their judiciary, and have always looked to it as the one impregnable bulwark of their liberties. The last two sovereigns under the monarchy, who did so much to lower the standard of the executive and legislative departments, did not dare to encroach materially upon the judi-

ciary department until the final attempt of the Queen, which resulted in the loss of her throne.

The people of Hawaii of all classes, as shown by the memorials presented to the commission, desire the judiciary, as at present organized, to be retained with as little change as possible, with the exception that they generally deem it best that there should be a United States district court to take jurisdiction of Federal cases. The one change which it seems desirable to make in the local judiciary is the abolition of the racial and mixed juries. Hitherto in criminal cases foreigners have been tried by juries composed of foreigners, and Hawaiians by juries composed of Hawaiians, and civil cases, if between foreigners, have been tried by foreign juries; if between Hawaiians, by Hawaiian juries; if between foreigners and Hawaiians, by juries composed of an equal number of foreigners and Hawaiians.

It is now proposed to abolish these race and mixed juries and to require instead merely that juries shall be composed of citizens of the United States who understand the English language, without respect to color or blood. As the Hawaiians will become citizens of the United States and as most of them understand the English language, the greater portion of them will be competent to sit on juries. The requirement that they shall understand the English language is designed not to exclude the Hawaiians, but to avoid the expense and delay that would result if all proceedings had to be gone through in both languages through an interpreter.

The Hawaiian judiciary may be briefly described as follows:

There are three sets of courts—a supreme court, superior courts of record, and local courts—corresponding to the three classes of courts usually found elsewhere. They are called the supreme court, the circuit courts (five in number), and the district courts (twenty-nine in number).

The district courts sit without jury. They have jurisdiction in criminal cases, over misdemeanors, and in civil cases up to \$300 except in cases of slander, libel, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, and cases involving title to real estate. The civil jurisdiction is exclusive up to \$50 and concurrent with that

of the circuit courts from \$50 to \$300. A general appeal lies in all cases, civil and criminal, to the circuit court, or an appeal solely on points of law may be taken to either the circuit or the supreme court.

The circuit courts sit with a jury, unless jury is waived, for the trial of most original law cases not begun in the district courts and in cases appealed from the district courts. The circuit judges sit without a jury in equity, admiralty, probate, and bankruptcy cases. Part of this jurisdiction will now be turned over to the United States district judge. There has as yet been no fusion of equity and law cases. Equity and law courts, as under the Federal system, are regarded as distinct, although presided over by the same judges. Exceptions lie from the circuit courts in law cases and general appeals in equity cases to the supreme court.

The supreme court consists of a chief justice and two associate justices. It hears appeals, exceptions, and writs of error from the circuit and district courts, and has original jurisdiction of contested-election cases, claims against the government, and the issuance of certain writs, such as habeas corpus, prohibition, mandamus, and certiorari. In case of the absence or disqualification of a justice, his place in any particular case may be filled by a circuit judge or member of the bar.

The chief justice and associate justices are appointed by the President (hereafter the governor), with the advice and consent of the Senate, and hold office, like the federal judges, during good behavior. The circuit judges are appointed in the same way and hold office for six years. The district judges are appointed by the President, with the approval of the cabinet (hereafter by the governor alone), and hold office for two years.

The chief justice and associate justices are all of American descent and are graduates of Eastern colleges and law schools. The circuit judges comprise two Americans, one Englishman, one Portuguese, and one Hawaiian. The district judges are mostly Hawaiians, but some of them are Americans and English.

There is a clerk of the judiciary department, with deputies, who are also clerks of the circuit courts. There are also

stenographers and interpreters. The executive officers of the courts are a marshal of the Republic (hereafter chief sheriff of the territory), sheriffs of the several circuits, deputy sheriffs of the several districts, and policemen.

The procedure in the various courts is much like that in the United States. The same is true of the laws administered by the courts. The statute law is largely copied from statutes (State or Federal) in the United States, and in the absence of statute law in a given case the common law is followed. American and English cases are cited, as in the United States. The supreme court law library contains over 5,000 volumes of well-selected law books.

There are also special courts for the trial of cases relating to private ways and water rights. These are presided over by "commissioners of private ways and water rights." These courts are of about the grade of district courts, but their jurisdiction is chiefly in the nature of equity jurisdiction. A general appeal lies from these commissioners to the supreme court.

There are two classes of lawyers, namely, those admitted to practice in all the courts and those admitted to practice in the lower courts only. The former are mostly Americans, but include a number of Hawaiians; the latter are mostly Hawaiians.

JNO. T. MORGAN.
W. F. FREAR.

APPENDIX C
(See Brief, pp. 44, 84)

In the
United States Circuit Court of Appeals
for the District of Hawaii
October Term, 1947

CONSTANCIO R. ALESNA, et al.,

Plaintiffs,

vs.

PHILIP L. RICE, as Judge of the
Circuit Court of the Fifth Judicial Cir-
cuit of the Territory of Hawaii; and
C. NILS TAVARES, as Attorney Gen-
eral of the Territory of Hawaii,

Defendants.

Civil No. 769

DECISION UPON MOTION FOR DETERMINATION
OF DEFENSES IN ADVANCE OF TRIAL—
F.R.C.P. 12 (d)

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FILED DEC. 4, 1947

at 10 o'clock and — minutes A. M.

Wm. F. Thompson, Jr., *Clerk*

By (s) E. C. Robinson,

Deputy Clerk

DECISION UPON MOTION FOR DETERMINATION
OF DEFENSES IN ADVANCE OF TRIAL—

F.R.C.P. 12 (d)

For a statement of the facts of this case which arises under the Civil Rights Act (28 U.S.C. Sec. 41 (14)), grows out of the 1946 strike in the sugar industry of Hawaii, and involves a criminal contempt indictment pending in a Territorial Circuit Court, see its initial phase reported in 69 F. S. 897. This reference discloses that a preliminary injunction issued restraining the defendant Attorney General of the Territory from proceeding further with the prosecution of the plaintiffs for contempt of the Territorial Court.

As mentioned in the intervening case of *Hall, et al. vs. Hawaiian Pineapple Company, Ltd.*, 72 F. S. 533 at 536, the issues left in balance should have been determined earlier. However, with the criminal contempt proceeding in the Fifth Circuit Court held up by the preliminary injunction, the plaintiffs were not overly insistent upon proceeding to trial and therefore consented to the several extensions of time requested by the Territorial Attorney General's Office. When the case began, the then Attorney General was not prepared to reach the constitutional issues, for he was short of assistants and time as he was then serving the Territorial Legislature which was in session at that time. Thereafter, Mr. Tavares resigned as Attorney General and Miss Lewis took over control of the office. While she too directed the office with an inadequate number of assistants, the office in June became involved in the tense pineapple strike described in *Hall et al. vs. Hawaiian Pineapple Company* (supra). Accordingly, the court too being otherwise engaged, numerous stipulations extending time were approved. On July 21, 1947 the defendants filed their Answers. It may be here noted that incidentally as of this date, the Territory has a new Attorney General, though no formal request for substitution has been presented.

On July 22, 1947 the defendants filed this Motion under F.R.C.P. 12 (d) , (28 U.S.C. following Sec. 723-c) , and it was set for hearing August 26, 1947. Prior to that date, Mr. Jenks applied on behalf of the Hawaii Employers Council for permission to appear in the case as an *amicus curiae*. The application was resisted by the plaintiffs and favored by the defendants. The request was granted over objection August 11, 1947.

The oral arguments upon this Motion were extensive and when, due to interruptions, they were finally concluded on September 8, 1947, permission was granted to file briefs. On September 12, 1947, the plaintiffs filed a ninety-three page brief, the *amicus curiae* one of fifty-nine pages and the defendants a two-page memorandum. Until now other court business has prevented the complete digestion of these briefs.

The Motion presents for consideration six of the defenses set up in the Answer. Summarized these are as follows:

1. That the complaint fails to state a cause of action in that the plaintiffs have an adequate remedy in the criminal contempt prosecution in the Territorial Court as there all defenses could be asserted and the constitutional issues raised subject to a right of appeal to the Territorial Supreme Court and, if need be, from there to the U. S. Supreme Court.
2. That the Comity Statute—28 U.S.C. Sec. 379—denies this court jurisdiction of the complaint.
3. That this court has no jurisdiction to enjoin a Territorial Judge.
4. That such a judge is not a proper party defendant.
5. That the complaint fails to state a cause of action for equitable or any other relief, and
6. That even if the Territorial Court's Amended Restraining Order was void, it will support an indictment for contempt.

At the outset, the court posed for the parties consideration the correctness of its prior holdings that the Civil

Rights Act's remedies were available in Hawaii despite the fact that in conferring jurisdiction upon District Courts Congress omitted the word "Territory". Both agreed with the court that as the Act applies specifically to a Territory and confers upon one, whose civil rights secured by the Constitution and laws of the United States have been denied by another under color of the law of any Territory, a right to sue at law or in equity for redress (8 U.S.C. Sec. 43), jurisdiction exists in a legislative Federal court in a Territory and may be invoked by one in a proper case despite the fact that the Congress left out the word "Territory" in granting jurisdiction of such suits to United States District Courts.

In the light of the history, the objective and the wording of the whole Act, the word "state" appearing in 28 U.S.C. Sec. 41 (14) should not be narrowly interpreted. Indeed there is more reason under the Civil Rights Act to interpret liberally the word "state" to include "Territory" than to do likewise with reference to 28 U.S.C. Sec. 380 as has recently been done by a three-judge court sitting here in the case of *Mo Hock Ke Lok Po, et al. vs. Ingram M. Stainback, Governor, et al.*, Civil No. 765 (October 22, 1947). But see dissent by Denman, Circuit Judge. In that case it has been specifically held that Congress by not including the word "Territory" in 28 U.S.C. Sec. 41 (14) intended to leave such issues to litigation in Territorial courts unless the Federal jurisdictional amount was alleged. Perhaps that ruling is binding here. But, regardless, to hold that for the purposes of this Act, the word "state" does not include Territory would be to prevent the will of Congress having its effect in this part of the United States. Yet Congress intended to protect the Constitutional and Federal civil rights of all people everywhere in the nation. See *Screws vs. United States*, 325 U. S. 91, 98 (1945). Since 1900 Hawaii has been an incorporated part of the United States, and the Federal rights of its people are not a single iota less valuable than are those

of the inhabitants of a state. (See 48 U.S.C. Sec. 491 et seq.) Having created the right, having given this legislative court the jurisdiction of a "court of the United States" (48 U.S.C. Sec. 641 et seq.), and having made applicable to the two incorporated Territories the criminal provisions of the Act, (18 U.S.C. Sections 51, 52) there is no insurmountable obstacle to making effective by judicial action the granted civil remedy in a Territory for such an important right and thus curing what seems to be an oversight or an imperfection in the statute. *Keifer & Keifer vs. Reconstruction Finance Corporation*, 306 U. S. 381, 389 (1939); *Texas & N. O. R. Railway Co. vs. Railway Clerks*, 281 U. S. 548, 568 (1930).

Before reaching the defendants' Motion, counsel for plaintiffs suggested that the court had no jurisdiction to entertain it as the defendants had not appealed from the Order granting the preliminary injunction. (28 U.S.C. Sec. 227). Having resisted issuance of the preliminary injunction, plaintiffs argue that defendants cannot be heard again upon the same or similar questions of law, and that the only thing remaining to be done is to proceed to trial. The Court ruled against plaintiffs because it believed, amongst other reasons, that the constitutional issues had not been examined adequately heretofore on account of the Attorney General's reluctance in February to reach them in his argument upon the prayer for a preliminary injunction. The Statute permitting appeals from interlocutory decrees granting preliminary injunctions does not require a party to appeal at that time. He may, at his option, await the final decree and raise all questions by appealing from it. *Victor Talking Machine Company vs. George*, 105 F. (2) 697-C.C.A. 3rd (1939). That being so, there is no rule of law which prohibits a party defendant from taking advantage of F.R. C.P. 12 (d) in the absence of an Order of the Court deferring consideration of the defenses in point of law until trial. No such order was made here for the essential facts

necessary to a consideration of the questions of law are amply set forth in the voluminous pleadings.

Attached to the defendants' Answer, incorporated as a part thereof, are two lengthy exhibits. These exhibits constitute the complete record of all that transpired in the Fifth Circuit Court of the Territory from the date the Lihue Plantation Company applied for equitable relief until the court, upon its own Motion, amended its Restraining Order. Soon after the defendants' Answer was filed, plaintiffs moved to strike paragraphs V and XXIV of the Answer of which these exhibits were made a part on the grounds of redundancy, impertinency, and immateriality. During the course of argument upon this Rule 12 (d) Motion, a question arose as to whether or not this court could consider these exhibits to see the basis for the Territorial Court's issuance of its Amended Restraining Order issued by Judge Rice. Plaintiffs argue that it is improper to look behind the Order and besides it is void on its face.

If need be, the court may consider the exhibits attached to and made part of the pleadings of both parties. Together they reveal every step taken in the Territorial Court and are either certified copies (defendants) or copies thereof (plaintiffs). On the other hand, if those attached to the Answer be deemed improper pleading, the defendants' Motion that the court consider them in connection with the Rule 12 (d) Motion transforms that into a "speaking Motion" countenanced by the Federal Rules of Civil Procedure. See Rule 12 (b) and notes thereunder. See also *Samara vs. United States*, 129 F. (2) 594 at 597, C.C.A. 2nd (1942); *Gallup vs. Caldwell*, 120 F. (2) 90 at 92, C.C.A. 3rd (1941); and Rule 12 (b) with approved amendment. The Certificate of the Clerk of the Territorial Court provides here even a better guarantee of factual certainty than an affidavit. In any event, with a certified record of all steps taken in the Territorial Court attached to the pleading, to consider them under Rule 12 (b) as transposing the pending Motion into

one for Summary Judgment under Rule 56 would be an act of judicial economy. What did happen in the Territorial Court is beyond all dispute but the technical point that allegations in an Answer are deemed denied. But this point is irrelevant to a speaking Motion. There is before this court a reliable record of everything the Territorial Court did and said, including argument of counsel, affidavits and the evidence of witnesses who testified. This court may consider that record if need be in disposing of the Motion.

Plaintiffs' pending Motion to Strike those parts of defendants' Answer may also be taken as hereby denied.

With preliminary technicalities disposed of, we come to a consideration of the major contentions of law.

As indicated to counsel during oral argument, the court adheres to its former rulings that the Norris-LaGuardia Act, 29 U.S.C. Sec. 101 et seq., does not apply to the courts of the Territory. Nor does it give this Federal Court exclusive jurisdiction to issue in the Territory injunctions in labor disputes in consonance with the terms of the Norris-LaGuardia Act. See *Alesna, et al. vs. Rice, et al.*, and *Hall, et al. vs. Hawaiian Pineapple Company*, (both supra).

In the Pineapple case, it was stated that under the decision in *United States vs. Hutcheson*, 312 U. S. 219 (1941), the rights of labor set forth in Sec. 20 of the Clayton Act, 29 U.S.C. Sec. 52, and Sec. 4 of the Norris-LaGuardia Act, 29 U.S.C. Sec. 104, have been federalized as substantive rights, and that those substantive rights are binding upon the Territory. When re-examined, at the suggestion of both counsel, the statement is found to be inaccurate as it is too broad and general. To the extent that the rights enumerated in the Clayton and Norris-LaGuardia Acts coincide with rights guaranteed by the First Amendment to the Constitution, they are, of course, binding upon the Territory. Beyond that they are not binding upon the Territory any more than they are upon a state—which is not at all—for both Acts are limitations upon, and only upon, the Federal Government

and its courts. Both Acts were passed to correct judicial interpretations making applicable to labor organizations and activities the Sherman Anti-Trust Act. By what is thought was clear legislation, Congress has twice notified the courts that labor organizations and activities are exempt from the Sherman Act, *Wilson & Co. vs. Birl*, 105 F. (2) 948 at 952, C.C.A. 3rd (1939). In the Clayton Act, Sec. 20, Congress disclosed that none of the specified Acts shall be "held to be violations of any law of the United States." The history of this phase reveals that originally, as it came to the Senate from the House, the wording was "nor shall any of the Acts specified in this paragraph be considered or held to be violations of the Anti-Trust laws." Upon the Senate floor, the present wording of Sec. 20 was adopted and from the discussions it is apparent that the intent was to modify the Sherman Act and any other Federal statute which might have a bearing thereon. See Congressional Record, 63rd Congress, 2nd Session, Vol. 51, Part 14, pages 14365-14367. In any event, the limitations were upon the Federal Government, and not an invasion of the rights of the states. And as also before noted, there is nothing in either the Clayton Act or the Norris-LaGuardia Act which under the doctrine of the *Hutcheson* case must be construed together with the Sherman Act as a single piece of integrated legislation—which evidences an intention by Congress to decrease, as it could have, the measure of domestic power which it had in 1900 given the Territory of Hawaii. A limitation upon the broad domestic powers previously given the Territory is not presumed. *Puerto Rico vs. Shell Co. (P.R.) Limited, et al.*, 302 U. S. 253, at 260-263 (1937), *Inter-Island Steam Navigation Co. vs. Territory of Hawaii*, 305 U. S. 306 at 312 (1938), *Kawananakoa vs. Polyblank*, 205 U. S. 349 at 353 (1907), and *Yerian vs. Territory of Hawaii*, 130 F. (2) 786, C.C.A. 9th (1942).

That the Clayton and Norris-LaGuardia Acts are limitations upon Federal law only is to be noted in the decisions

of the Supreme Court in *Allen-Bradley Co. vs. Board*, 315 U. S. 740 at 748 (1942) and *Apex Hosiery Co. vs. Leader*, 310 U. S. 469 (1940).

With all prior rulings in this case adhered to—including the propriety of the circuit court judge being a party defendant, *Picking et al. vs. Pennsylvania R. R. Co.*, 151 F. (2) 240 at 250, C.C.A. 3rd (1945)—thus once again disposing adversely to the defendants of their first four contentions, with the generalization in the Pineapple case clarified, we reach the two points which in issuing the preliminary injunction, the court stated would need further examination. *Alesna vs. Rice*, 69 F. S. 897 at 901.

The questions specifically are: Did Judge Rice's Amended Restraining Order violate plaintiffs' rights, guaranteed by the First Amendment (1) to freedom of speech and (2) to assemble peaceably?

Before touching these delicate and important questions, it may be well to restate that where the constitutional rights of individuals are at stake, a Federal Court has a peculiar duty to step in, in a proper case, and if need be protect the individual against a threatened unjustifiable exercise of the power of a state or Territory. The adequacy of an opportunity to become a defendant in a criminal case and to then raise the same question of law before a court also bound by the Constitution is questionable. As Borchard points out, it is not at all a remedy. It is a hazard. See "Challenging Penal Statutes", Edwin Borchard, 52 Yale L. J. 445 at 461. True such has often been assigned as a reason for declining to act, but it is not an impressive one, at least in a First Amendment case. See *Douglas vs. Jeannette*, 319 U. S. 161 (1943). Where vital human liberties protected by the First Amendment, as distinguished from property rights, are at stake and are on the verge of possibly being crushed by the power of the State or Territory, a Federal court in a case alleging unusual circumstances is justified in acting despite the availability of a remedy later in the State or Territorial

courts. The motivating philosophy in cases such as this has been well expressed in *Stapleton vs. Mitchell*, 60 F. S. 51, where at p. 55 the court said:

“In sum, it seems fairly plain that although the state courts are the preferable forum for the adjudication of the question whether a state statute offends against the Federal Constitution on the theory that state courts equally with the Federal courts are charged with the duty of safeguarding constitutional rights, and since they are the sole judge of the meaning and import of a state statute they should be the first judge of whether state law transcends rights protected by the Federal Constitution. But, where as here, fundamental human liberties are drawn in issue, the Federal courts are a proper forum for the determination of the question whether a state statute trespasses upon an area which the Federal Constitution has set apart as hallowed grounds for expression of democratic ideas. We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.”

The plaintiffs have been indicted for criminal contempt. The Territorial law defines criminal contempt as a felony but also gives the court power to punish contempt summarily, R.L. of H. 1945, Sec. 11140. In the many years that this law has been in effect, this is said to be the first time that a Territorial judge, instead of using his summary powers, referred the matter to the grand jury. The indictment charges plaintiffs with being in contempt in that—

1. They picketed in mass at a designated time and place for the purpose of obstructing and interfering with ingress to or egress from the Lihue Plantation Company's property by its employees, and others lawfully seeking to enter or leave the company's property; and that

2. They picketed additionally at said time and place in groups of more than three at points of ingress and egress to the Company's property, and the pickets were not in motion nor at least ten feet apart,

all, it is charged, contrary to the terms of the Fifth Circuit Court's Amended Restraining Order.

The portions of this Amended Restraining Order which plaintiffs strenuously assert violated their constitutional rights to freedom of speech and to assemble peaceably are to be found in Sec. 7 of the Restraining Order and its concluding "in furtherance" clause.

The defendants' position is—

1. That the plaintiffs have not stated a claim for relief. The decision of the court in *Hall vs. Hawaiian Pineapple Company*, supra, it is said disposes of the questions of law herein that what the Territorial Court did was in the exercise of its powers and the plaintiffs should present their defenses in the Territorial forum.

2. That upon the authority of *United States vs. United Mine Workers of America*, 330 U. S. 258 (1947), even if Judge Rice's Order was void, it still will support an indictment for contempt for such an Order must nevertheless be obeyed until set aside by orderly judicial processes.

3. That the First Amendment does not guarantee the right of mass picketing in order to prevent ingress and egress to property.

4. That Judge Rice's Order is not unreasonable, but it is designed to fit temporarily a particular situation, and in no way interferes with plaintiffs' right to assemble peaceably elsewhere than at points of ingress and egress to Company property.

The plaintiffs' numerous contentions are—

(a) Exceptional circumstances are alleged in that

(1) It is alleged that the defendants engaged in a course of conduct to oppress and intimidate plaintiffs and other working men in the Territory so that they would fear to exercise their rights.

(2) The plaintiffs have been singled out and selected for prosecution under a statute never before used, all pursuant to a plan to intimidate and coerce plaintiffs and others in the exercise of their rights. That plaintiffs were singled out for prosecution because they were Union officers.

(3) The pendency of this criminal contempt case is an employer weapon to instill fear, spread confusion and weaken the Union's and plaintiffs' rights.

(4) Appeals would be costly and of no avail at least until the Ninth Circuit Court of Appeals was reached as the Supreme Court of the Territory in *I. L. W. U. vs. Wirtz*, 37 Haw. 404 (1946) has ruled adversely to plaintiffs' contentions concerning the Clayton and Norris-LaGuardia Acts.

(5) Here Judge Rice is the legislator, the wronged person, the prosecutor, and the executor.

(6) It is even claimed that it is contempt to violate a void Order.

(b) The decision in *Hall vs. Hawaiian Pineapple Company*, supra, does not control this case, for the reasons that

(1) This case is not moot. Special circumstances are alleged and plaintiffs are in peril of being unlawfully prosecuted for a felony.

(2) The Amended Restraining Order violates the First Amendment.

(3) The Fifth Circuit Court has already ruled adversely to plaintiffs' position on all substantive issues of Federal and constitutional law.

(4) If convicted, plaintiffs who are citizens will lose their civil rights and the non-citizens be barred from naturalization.

(c) The Amended Restraining Order violates substantive Federal rights under the Clayton and Norris-LaGuardia Acts.

(d) And finally—the only open issue here—that the Rice Order violates plaintiffs' constitutional rights as guaranteed by the First Amendment in that

(1) It constitutes unjustifiable previous restraint upon their rights of free speech and of assembly.

(2) It narrowly and unreasonably circumscribes these rights at the very time when they are of most value and does so without due regard for the size and scope of the industrial conflict involving 100,000 I.L.W.U. members, 12,000 acres of sugar cane land and twenty company towns and villages.

(3) The Order is vague, ambiguous, and confusing and places the risk of contempt unjustly upon the pickets to determine accurately just what it means, what are the points of ingress and egress, whether in any manner any act of theirs "otherwise" had the effect of accomplishing the prohibited acts, and that the "in furtherance" clause in the Order gives its specific prohibition a tentative quality. In short, it is claimed that it is not clear and explicit and unlawfully places the risk of non-obeyance upon men not to well versed in English, let alone the construction of legal language.

In support of their position that the Order violates their constitutional rights, the plaintiffs rely heavily upon—

Whitney vs. California, 274 U. S. 357 (1927).

Herndon vs. Lowry, 301 U. S. 242 (1937).

Thornhill vs. Alabama, 310 U. S. 88 (1940).

Bridges vs. California, 314 U. S. 252, 263 (1941).

West Virginia State Board of Education vs. Barnette, 319 U. S. 624, 638 (1943).

Thomas vs. Collins, 323 U. S. 516, 529 (1945).

Marsh vs. Alabama, 326 U. S. 501 (1946).

All cases attesting to the special place occupied by the liberties protected by the First Amendment concerning which in *Stapleton vs. Mitchell*, *supra*, Judge Huxman at p. 63, dissenting in part, well summarizes the current law as gathered from the Thomas case as follows—referring first to the usual rule that a statute is presumed to be constitutional—

"But it has no application when sacred constitutional guaranteed rights are involved. Then an entirely different principle must guide us. That is the conclusion

I draw from the decision of the Supreme Court in the Thomas case. The court points out that these constitutional guarantees have a sanctity and solemnity which is not accorded to general rights arising by operation of statutory law. When a regulation impinges one of these rights, it must not only be justified by a clear public interest and be passed to meet a clear and present danger to such right, but it must also be reasonable and must have a reasonable relation to the object sought to be accomplished. In such case, there is no presumption of constitutionality. There is rather a suspicion in the minds of the courts, the guardian of our constitutional liberties, and the burden is upon him who would uphold the interference with such rights to carry the burden of justifying the interference within the test laid down by the Supreme Court in the Thomas case. As stated by the Supreme Court, when the right to restrict the exercise of free speech is the subject of inquiry, it is our 'tradition to allow the widest room for discussion, the narrowest range for its restriction.' (323 U. S. 516, 65 S. Ct. 315, 323)."

The plaintiffs argue there was not only no clear and present danger to the public but further the restraint imposed is unreasonable. See *Thornhill vs. Alabama*, supra, *Carpenters & Joiners Union vs. Ritter's Cafe*, 315 U. S. 722, (1942), and *Thomas vs. Collins*, supra.

In the preliminary stage of this case, it was said that it appeared, subject to a later and fuller examination of the question of law based upon the Constitution that in view of the exceptional and unusual circumstances alleged that the plaintiffs had stated a claim for equitable relief. *Alesna vs. Rice*, at p. 901.

Is there, now that these questions of law have been examined in an atmosphere less tense than that existing in February, and in view of *Hall vs. Hawaiian Pineapple Company*, supra, any reason to alter the initial ruling?

I am inclined to believe that there is. It does not now appear to me that the plaintiffs' constitutional rights have been invaded by Judge Rice's Restraining Order.

It has already been decided, though to be sure plaintiffs do not agree, that the Territory has the same domestic powers as a state and may "take adequate steps to preserve the peace and protect the privacy, the lives and the property of its residents . . .", *A. F. of L. vs. Swing*, 312 U. S. 321 at 325 (1941). And this it may do by a statute narrowly drawn or by an injunction tailored to fit a specific situation.

Generally speaking, under normal circumstances, no state or Territory can prohibit one's full exercise of his Federal and constitutional rights. Because of Article 6 of the Constitution, the Territory could not, for example, make it a crime for labor to exercise in Hawaii its rights under the Constitution or any federal law any more than a state could. That is what was meant when heretofore the court remarked that the Clayton Act and the Norris-LaGuardia Act did not apply to the Territory "directly" but that Territorial statutes and injunctions must respect labor's Federal and constitutional rights. But like a state, the Territory may take steps to so regulate, without destroying, these rights of labor that the equally valuable rights of others will be safeguarded and peace and order maintained.

A general statutory restraint upon the liberties guaranteed by the First Amendment is not presumed constitutional but, as noted, is regarded by the courts with suspicion. *Stapleton vs. Mitchell*, *supra*.

But the same rule does not apply to specific injunctions. Restraints thereon by Orders of Courts are presumably valid unless obviously void on their face, for they are deemed to have been carefully drafted by the court to fit a particular situation.

Here, contrary to plaintiff's contentions, this Order is not void on its face and may, without resort to the evidence on which it is based, be deemed valid. Although the attack upon the Order is concentrated upon its paragraph (7) and its "in furtherance" clause, it is apparent from a reading of the whole Order that what is prohibited is not the lawful

but the unlawful. Omitting the preliminaries, the Order reads—

“WHEREFORE, you, are hereby restrained and enjoined until the further order of this Court from in any way

(1) Obstructing or attempting to obstruct, by massing of pickets or otherwise, the ingress to or egress from the Petitioner's mill, store or other plantation buildings or premises located in the County of Kauai, Territory of Hawaii, of the Petitioner, its employees, or any others who may enter or desire to enter said premises for the purpose of performing work or for other lawful occasion;

(2) Obstructing or attempting to obstruct, by massing of pickets or otherwise, freedom of movement on or along the public or private roads or ways in or about the Petitioner's premises, of the Petitioner, its employees, or any other persons who may pass or desire to pass on or along said roads or ways for the purpose of performing work or for other lawful occasion;

(3) Obstructing or attempting to obstruct the free movement in, on or about the Petitioner's premises, of the Petitioner, its employees, or any other persons who may be in, on or about said premises for the purpose of performing work or for other lawful occasion;

(4) Threatening violence to, intimidating, or coercing, or attempting to intimidate or coerce, the employees of the Petitioner or those seeking employment with the Petitioner, or any persons who are lawfully upon the Petitioner's premises or are proceeding to or from said premises;

(5) Coercing or intimidating, or attempting to coerce or intimidate, employees of the Petitioner or those seeking employment with the Petitioner, by means of threats concerning the safety or welfare of the families of such employees or the families of those seeking employment with the Petitioner; or threatening violence to, or coercing or intimidating, or attempting to coerce or intimidate, such families;

(6) Without express written consent of the occupants thereof, visiting or being at or about the dwelling

houses or residence premises belonging to Petitioner and occupied by employees of or persons seeking employment with Petitioner and thereat being offensive, disorderly, threatening or intimidating (in words or actions) towards, and harassing, such occupants, or any of them;

(7) Mass picketing by assembling in compact groups or congregating in crowds on or near real property of the Petitioner, whether used for business or residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property by Petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property;

AND IN FURTHERANCE HEREOF, you are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets in a group at any point and station when stationed at points of ingress to and egress from the Petitioner's property, provided, however, that any pickets in excess of three (3) at any one point and station, shall be in motion and, except when passing each other, shall maintain a distance of not less than ten (10) feet between each other and such picketing as shall be done by them shall not be violative of any of the preceding restrictive provisions hereof; all pickets being hereby enjoined from picketing other than in a peaceful and lawful manner and from obstructing the Petitioner, its employees, or any other persons lawfully seeking to enter or leave the Petitioner's premises; and all pickets being also enjoined from otherwise committing any of the acts hereinbefore prohibited. Any persons engaged in such picketing as is not hereby restricted or prohibited shall wear arm bands reading "Authorized Picket," or "U.P".

This Order, read without straining to find defects and ambiguities, is sufficiently clear and explicit as to what is prohibited to guide those affected if they gave it, as they must, a fair reading. And it was not necessary for the court to translate its directions into various foreign languages. If

such was necessary, that duty fell upon the Union, not the court.

This Order, intelligently read, in no way restrains plaintiff's rights to freedom of speech or of assembly. Indeed, it does not even prohibit mass picketing. It simply restrains mass picketing at readily ascertainable and customary points of ingress and egress when such type picketing is for the purpose of interfering with the equally valuable rights of others—owners, employees and other persons lawfully entitled to enter or leave the property unmolested. A mass of pickets in the hundreds at the gates of company property so as to prevent others lawfully entitled to enter or leave is obviously not an exercise of the freedom of utterance, but is an endeavor by a show of physical force to prevent others from having the full advantage of their constitutional rights. The right to picket may not be so exercised that by physical force or position the rights of non-strikers to work and the rights of property owners to protect and maintain and even operate their property is denied.

Under neither the Constitution nor any Federal law is conduct such as that prohibited by the Order immunized from state or Territorial regulation and it was only such conduct that Judge Rice prohibited. He might even, without interfering with the right to picket peacefully, have deemed the situation to have warranted the prohibition of all mass picketing, but he saw fit only to regulate it at certain places when and only when it was conducted for the purpose or had the effect of blocking ingress and egress.

As a further means of controlling such conduct and assuring others of the full enjoyment of their rights, without danger of physical combat, Judge Rice ordered that at the usual points of ingress and egress the pickets be limited to three and at all other picket points or stations if more than three pickets were used, that they be in motion and at least ten feet apart. Plaintiffs claim that this limitation is unreasonable, that apparently Judge Rice deemed two company but

three a crowd. Small though the number is, especially in view of the size of the strike, I cannot find it to be an unreasonable regulation, especially as a temporary measure. The obvious purpose of the regulation again clearly appears to be to secure for others an adequate opportunity to utilize their rights without fear or obstruction, and to that end the Order prohibits those enjoined from blocking public and private roads and ways. Nor is there merit in the argument that the Order in restraining the International Union as well as its local unit is too general. To be effective, all acting in concert had to be enjoined.

Not only is this Restraining Order not void on its face, but going in back of it, as we may, to the picture of the situation described to Judge Rice by the affidavits and the testimony of the witnesses he heard, it stands revealed that the allegations of the petition were sufficiently supported to warrant the utilization by him of his court's equity powers. Granted that it was an *ex parte* hearing, as allowed by Territorial statute, Ch. 302, R. L. H. (1945), it must still be remembered that this is a Temporary Restraining Order which at no time did plaintiffs or others restrained seek to have modified. They only attack the jurisdiction of the Territorial court. The situation made to appear to Judge Rice by affidavit and evidence was one of increasing tenseness lending reasonable credence to the belief that if things were allowed to continue, with ineffective police control, bloodshed might easily ensue. The described scene was one of mill and store entrances solidly blocked by hundreds of massed pickets preventing anyone from going in or out even for maintenance purposes, of plantation roads blocked, of homes picketed and families threatened, annoyed, and disturbed, and of a rising tempo of non-peace inducing language wherever pickets were assembled. When the record of the evidence presented to Judge Rice is read, it provides a further reason for holding his Order valid.

The Order in no way interferes with plaintiffs' or anyone else's right to assemble peaceably. It simply prohibits reasonably picketing in large numbers, or the assembly of numerous persons for the purpose of blocking entrances and exits, public and private roads and ways so that others may not exercise their rights without fear or obstruction. The right of those on strike to assemble in order to hold a meeting or to hear those who wished to speak is not inhibited so long as that right is not exercised in such a way as to deny to others their rights.

So it is that upon the facts alleged—facts incidentally which do not support plaintiffs' argument that a conspiracy to deny plaintiffs their rights and to single them out for prosecution in order to intimidate others has been alleged in the complaint, and also as these facts are amplified by defendants' speaking motion—I find in point of law that plaintiffs' constitutional rights have not been invaded by the Amended Restraining Order.

There being no genuine issues of fact remaining to be tried, summary judgment for the defendants may be entered.

In the light of this disposition of the case, it is unnecessary to rule upon the question of whether if void the Rice Order would nevertheless support an indictment for contempt on the strength of the recent Lewis case, *supra*. Though unnecessary to decide, it may be remarked that it appears that there is no basis here for an application of the doctrine of *Erie vs. Tompkins*, 304 U.S. 64 (1938), and *Waialua Agricultural Co. vs. Christian*, 305 U.S. 91 (1938), as this is not a diversity of citizenship case and involves no right dependent upon Territorial law. Whether or not the Territorial courts wish to change the Territorial law on the subject, as revealed by *Dole vs. Gear*, 14 H. 554 (1903), *Rose vs. Ashford*, 22 H. 469 (1915), and *Sakan vs. Ashford*, 23 H. 267 (1916), in the light of what for Federal courts the Supreme Court has decided in the Lewis case is not for this court to determine.

The Preliminary Injunction is dissolved and a judgment for defendants may be entered.

Dated at Honolulu, T. H., December 3, 1947.

J. FRANK McLAUGHLIN (Signed)
Judge

APPENDIX D

1-8 Inclusive

D-1

(See Brief, pp. 15, 90)

References to and Excerpts From Congressional Record Re Local Autonomy for Territorial Courts and Procedure.

MR. CULLOM . . . *We found a supreme court there, not to administer United States statutes, but to administer the laws of the Territory, which is preserved in the bill and which is in harmony, as we thought, with the general principles and interests of the Government of the United States as well as of that Territory.*

The plan of the bill is to retain the legislature, the system of local courts, purely to administer Territorial statutes, and to provide a United States judge to administer the United States laws. . . . We believe there is no occasion for changing everything there simply because we can and because in the Territories here in our own country we have United States judges to administer Territorial statutes as well as United States statutes. We believe it is wise to allow the judges of the local courts there to have entire control and jurisdiction over the local statutes of the Territory and a United States judge to administer the United States laws. (Emphasis added.) (33 Cong. Rec. 1871).

. . . But the theory of this bill is that they have a supreme court, a circuit court, and other inferior courts, and there are appeals from one to another of the territorial courts, and those judges, either of the circuit or supreme court, have nothing to do with decisions on

other statutes than those local to the islands. They exist just as in a State. (Emphasis added.) (33 Cong. Rec. 1929).

... I do not know that it is a matter of very great consequence whether those judges are appointed by the governor or by the President of the United States; but as we are *dealing with a settled community, a state, a government*, full of people, so far as it has gone—not a great number there yet—but there has been a *government established for a great many years; they have their system of courts, they have their system of law, they have their construction of statutes by their supreme court and circuit courts, and they are familiar with them, and they felt entirely satisfied with the system they have*, and it seemed to the commission and afterwards to the committee that *the less we interfered with them the better it was for the people there as well as for the United States generally.* . . .

So we found the supreme court there doing business with just as much dignity, with just as much sense of honor and of duty, and apparently with just as much intelligence as the supreme court of the State of Illinois or of Connecticut, or of any other State. There was nothing in the establishment there in any way that the commission could see would justify us in uprooting the supreme court or the circuit courts of the islands and requiring the Government of the United States to meddle with them. So it was the conclusion of the commission and of the committee that as far as that was concerned we ought to leave that alone at present. (Emphasis added.) (33 Cong. Rec. 2025).

MR. MORGAN . . . there are other circumstances which have been forced upon the attention of Congress hitherto, chiefly by the sparsity of an educated and trained population in the Territories which we have heretofore organized. Heretofore, up to the present time indeed, except, I believe, in the case of Alaska, we have conferred upon what they call the United States courts in the Territories—the same courts the Senator from Connecticut is now trying to put upon the island of Hawaii

—we have conferred upon them the power to enforce the laws of the United States, assuming under the decisions of the Supreme Court that Congress as the supreme sovereign over the Territories has the right to combine the powers of the State government and the powers of the Federal Government in the appointment of judicial officers for the Territories. We have conferred upon them *the double duty, and sometimes the irreconcilable duty, of passing upon questions that arise in the Territories themselves, and which concern private interests entirely, combining them with questions that arise under the laws of the United States and are entirely different in their purposes and in the means of execution from the Territorial or local laws.* For instance, we have conferred upon those Territorial courts the power of admiralty in several cases.

Now what greater inconsistency can there be than that of a Territorial court exercising all of the local jurisdiction that belongs to a State court or county court or probate court or criminal court and uniting that with the jurisdiction conferred under the laws of the United States upon the district and circuit courts in admiralty? How are we to expect to find judges of sufficient breadth of learning, sufficient ability to manage these diverse and incongruous conditions? We have escaped heretofore for the reason that it has very seldom happened that our Territorial courts have been called upon to administer admiralty jurisdiction, but I can conceive of nothing more unseemly in legislation to provide judicial jurisdiction and officers than to place in the hands, for instance, of a circuit judge of the State of Alabama the power to determine and execute the laws of the United States in Alabama. If he can not do it properly in Alabama, if there are public reasons connected with the harmony of the judicial establishment why a circuit judge in Alabama can not exercise such power, how can we justify conferring double jurisdiction upon a Territorial court?

The Territorial court, under the decisions of the Supreme Court, derives from Congress, in view of its competent powers, *all of the rights of a circuit court of*

Alabama or any other State, and also all of the rights, powers, and jurisdiction that belong to Federal courts. Those courts in practice have two dockets, one of which is for the disposal of cases that are local in their origin and in their effect—purely local litigation. The other docket relates to cases of the Government of the United States or cases in which the Government of the United States is involved. This committee, and the commission, also, having some idea about this matter, undertook to get rid of this incongruity, this unnecessary mixing of two jurisdictions in the mind of a man serving two masters upon the bench, and we first of all separated the local courts in Hawaii entirely from the courts of the United States, and gave to them that kind of local jurisdiction that a circuit or other court in a State possesses.

Then in order that the Government of the United States might have its rightful powers exercised judicially in the Hawaiian Islands, the committee recommended that a district court of the United States should be established in those islands having a jurisdiction that is unequivocal, that is plenary, that has been defined by statute and by judicial decisions so that there is no doubt or dispute about its powers at all, and that in that jurisdiction that judge, representing the Government of the United States, should preside in all cases where the laws and rights of the Government of the United States were involved.

Now, is there any serious objection, is there any constitutional objection, can there be any objection in theory or in practice to establishing in the islands of Hawaii the two separate jurisdictions just as they exist in the States? . . . (Emphasis added.) (33 Cong. Rec. 2123-4) .

Similar sentiments are expressed in 33 Cong. Rec., by other Senators: Stewart (p. 1932-3) , Foraker (1933-4, 2133) , Cullom again (2189) , Morgan again (2191-4, 2398-2400) , Teller (2388-9, 2441) , Nelson (2397) .

In the debates in the House, on the same bill, the same views were expressed, Rep. Knox and Rep. Hamilton taking the leading part: See 33 Cong. Rec. 3771, 3801, 3859, and conference reports, pp. 4358, 4649, and 4733, the last mentioned one stating as follows:

The amendments to Section 86 in effect separate the Territorial from the Federal jurisdiction in courts of the Territory of Hawaii, as provided in the House bill, the provision for appeals from the supreme court of Hawaii to the ninth judicial circuit being stricken out and the jurisdiction of United States district and circuit courts is conferred upon the Federal court established.

APPENDIX D-2

(See Brief, p. 19)

Laws Re Hawaiian Judiciary Continued in Effect by Organic Act.

These laws included CIVIL LAWS OF 1897, TITLE VIII, JUDICIARY DEPARTMENT, including provisions vesting the *judicial power* in the local courts (sec. 1105); adopting as the law of the Hawaiian Islands the common law of England as ascertained by English and American decisions (§ 1109, now R.L. 1945, § 1); providing for the jurisdiction and powers of district courts (ch. 79, now R.L. 1945, ch. 190); providing for the *jurisdiction and powers of circuit courts and circuit judges at chambers* (ch. 80, now R.L. 1945, ch. 189); giving to *circuit judges at chambers power "to hear and determine all matters in Equity"* (§ 1145, now R.L. 1945, § 9648); providing for the organization and powers of the local Supreme Court (ch. 81, now R.L. 1945, ch. 188), including the power to "*issue writs of . . . injunction . . .*" (§ 1166, now R.L. 1945, § 9605); prescribing civil procedure in district courts (ch. 85, now partly in R.L. 1945, ch. 203);

and *civil procedure in courts of record* (ch. 86, now R.L. 1945, ch. 204) ; allowing *issuance of injunctions and prescribing the conditions thereof* which required a bond in certain cases (§ 1235-7, now R.L. 1945, § 10050-10053) ; a chapter on evidence (ch. 91, now R.L. 1945, ch. 196) , a chapter on *equity, admiralty and probate jurisdiction* (ch. 97, now partly in ch. 302, R.L. 1945) , the admiralty provisions having been repealed by the Organic Act which gave such powers to the U. S. District Court for Hawaii as hereinafter stated; a provision allowing the equity judge to determine *ex parte* upon the propriety of granting the process prayed for, including injunctions as now amended (§ 1503, now R.L. 1945 § 12405) ; and a chapter of the Penal Code *regulating proceedings for contempt of court, and restricting the power of courts to punish for contempts so that, unless a trial by jury was had,* in which case a maximum of two years imprisonment or \$500 fine could be imposed, the Supreme Court could not imprison more than 3 months or fine more than \$100, or both, and lower courts were even more drastically restricted (Penal Laws 1897, § 257-262, now R.L. 1945, ch. 244, as amended) . It should particularly be noted that these restrictions last mentioned on the power to punish for contempts differed greatly from the then general provisions of Federal law applicable to Federal courts in general as to punishment for contempts, our local statutes being, in 1900, far more restrictive of those powers than the then Federal statutes, (See R.S. Secs. 718 to 725) , yet they were continued in effect by Congress subject to change by the *local legislature* (Org. Act, sec. 81, 48 U.S.C.A. 631) . Some of the most pertinent sections of the statutes above mentioned are printed in Appendix A to this brief.

APPENDIX D-3

(See Brief, p. 26)

Sections of Hawaiian Organic Act and of Revised Laws of Hawaii which would be affected if NLGA held to apply to Territorial Circuit Courts.

The following Organic Act provisions: § 6 (continuing in effect the "laws of Hawaii" not inconsistent with the Constitution or laws of the United States or of the Organic Act, subject to repeal or amendment by the local legislature or Congress), § 55 (granting to the local legislature power over "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable"), § 81 (vesting the "judicial power of the Territory" in the supreme court, circuit courts, and such inferior courts as the legislature might from time to time establish, and continuing in effect the "laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure" except as in the Organic Act itself otherwise provided, and "until the legislature shall otherwise provide"), § 83 (continuing in force, subject to modification by Congress or the legislature, the "laws of Hawaii relative to the judicial department, including civil and criminal procedure" except as amended by the Organic Act), § 86 (providing for the same relationship between the "courts" of the United States" and the "courts of the Territory" as between the former and State courts), as those provisions have been followed, interpreted and given effect by Congress and the courts for the last 47 years (see ante, pp. 10-23), all granting the same autonomy, practically, as that of a State, to the local legislature and courts and laws respecting judicial jurisdiction and procedure: would be drastically and radically reversed by the construction of the NLGA contended for by appellants. There would certainly, there-

fore, be a "conflict" between those special statutory policies uniformly established and followed by Congress for half a century, and an NLGA that changed and reversed the same.

Contrary to the appellant's statement, there are numerous provisions of the Territorial laws which, either in their original form at the time the Organic Act continued them in effect, or in modified form as amended by the legislature, were in effect at the time the NLGA was passed, which conferred jurisdiction and powers and regulated procedure of the equity courts in issuing injunctions in labor cases. To be sure, they did not specifically mention labor disputes, but in their broad terms they included both labor dispute and other cases. Hence, the statement that there was no local statute regulating injunctions in labor disputes, is not true. See R.L. 1945, § 1 (adopting the common law for Hawaii with certain exceptions), § 9648 (providing that the circuit judges at chambers should have power "1. To hear and determine all matters in equity" and "8. To issue writs of error . . . and all other writs and processes, . . . to corporation and individuals, that shall be necessary to the furtherance of justice and the regular execution of the law"), § 9650 (providing that chambers matters with certain exceptions not material here "shall be determined by the judge having jurisdiction thereof, without the intervention of a jury"), § 9653 (giving circuit judges power to "make and award all such judgments, decrees, orders and mandates, to issue all such executions and other processes, and to take all other steps necessary for the promotion of justice. . . .", etc.), § 9660 (giving circuit judges, with the approval of the supreme court, power to make rules "for regulating the practice and conducting the business of the "circuit courts and circuit judges at chambers," etc.), § 12401 (giving to circuit judges, in addition to the jurisdiction in equity otherwise conferred, "original and exclusive jurisdiction of every original process whether by bill, writ, petition or

otherwise, in which relief in equity is prayed for,” and power to “issue all general and special writs and processes, required in proceedings in equity to . . . corporations and individuals when necessary to secure justice and equity,” which certainly includes power to issue injunctions), § 12402 (giving such judges . . . full equity jurisdiction, according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate and complete remedy at law”), § 12403 (providing for suits in equity to be commenced by sworn bill or petition “according to the usual course of proceedings in equity” and to “be returnable on the rule days established by the judges”), § 12405 (providing that

Upon the filing of such petition process may issue by the clerk of the court as in actions at law *unless an injunction or other temporary order is prayed for, in which case the judge shall determine, ex parte*, upon the propriety of granting such process, and in cases not demanding secrecy or occasioning doubt, the judge may, before issuing process, grant an order to show cause, and make any interlocutory order in the matter which may appear necessary to the ends of justice.”),

§ 10050 (providing for prayer for issuance by circuit courts of injunctions in suits for unliquidated demands) § 10052 (providing for bond in cases where “constraint to the property of a defendant is prayed for”), and § 10053 (providing for issuance of orders to show cause and that “the defendant may in the meantime be restrained”), and §§ 11140-11144, regulating the power of the local supreme, circuit, and district courts and judges, and other local tribunals to punish for contempts, which *do not require*, like the NLGA, jury trial for such contempts, but provide that, if the case is summarily tried the penalties shall not exceed certain stated maximums, the highest of which maximums are, for the supreme court or justices thereof, fine not exceeding \$100 or imprisonment not exceeding sixty days, and also provid-

ing that, in the case of a conviction after a jury trial, the maximum shall not exceed two years imprisonment, or fine of \$500.

All of these sections of local law (which are printed in Appendix A to this brief) in their general effect relate to and cover suits which might involve injunctions or restraining orders and jurisdiction and procedure in cases involving labor disputes. The construction of the NLGA contended for by appellants would, by implication, amend all or most of these local statutes, by restricting the general powers and jurisdiction granted by them whenever the case involved a labor dispute, an exception which does not now appear in any of such local statutes. This clearly disproves the statement of appellants to the effect that there are no local statutes dealing with injunctions in labor disputes and hence no conflict with the NLGA as construed by them to apply directly to territorial circuit courts. See, also, argument brief, pp. 46-7, as to amendatory effect by implication of sec. 10 of the NLGA, if appellants' contention prevails.

APPENDIX D-4

(See Brief, p. 47)

Excerpts from congressional reports and debates indicating congressional intent to effectuate original purpose of Clayton Act.

These are the same character of acts which Congress in section 20 of the Clayton Act of October 15, 1914, sought to restrict from the operation of injunctions, but because of the interpretations placed by the courts on this section of the Clayton Act, the restrictions as contained therein have become more or less valueless to labor, and this section is intended by more specific language to overcome the qualifying effects of the decisions of the courts in this respect. (H. Jud. Comm. Rept. No. 669, pp. 7-8, Referring to Section 4 of the Act).

Mr. *Beedy* . . . It is very clear to me that if the provisions of the Clayton Act, as originally written, had not been abused, we should never have been called upon to consider this so-called anti-injunction bill of the present day. (75 Cong. Rec. 5468) .

Mr. *LaGuardia* . . . Gentlemen, there is one reason why this legislation is before Congress, . . . disobedience of the law on the part of a few *Federal* judges. If the courts had been satisfied to construe the law as enacted by Congress, there would not be any need of legislation of this kind. . . .

What happened? A few of these *Federal judges* . . . wilfully disobeyed the law; . . . I have spoken with many of my colleagues who have been on the bench of their respective States, and every one of them has told me of the terrible abuses existing in the *Federal courts* in labor disputes. (75 Cong. Rec. 5478) . (Emphasis added.)

Mr. *McKeown* . . . This bill does nothing more or less than put into actual effect what the Congress did years ago when they passed the Clayton Act; that is to say, by a certain construction of the Supreme Court and *other Federal courts* they took out of that act the many safeguards that Congress had put in there, . . . (75 Cong. Rec. 5468) .

To the same effect also are the remarks of Sen. Blaine (75 Cong. Rec. 4619) , Sen. Wagner (Id. 4915) , Rep. Celler (Id. 5488-9, 5505) , and Rep. Schneider (Id. 5514) .

APPENDIX D-5

(See Brief, p. 51)

References to and excerpts from congressional reports and debates indicating Congress recognized constitutional limitations on power to restrict original jurisdiction of Supreme Court.

Senator Blaine:

This bill is not a complete labor code. It does not set forth all of the laws applicable to injunctions in

labor disputes. It does not repeal the labor sections of the Clayton Act but *merely supplements these provisions* and clarifies the intent of Congress.

It is drawn upon the theory that Congress has authority to *define and limit the jurisdiction of the Federal courts, other than the original jurisdiction conferred upon the Supreme Court by the Constitution*. All *inferior Federal courts* are created by law and it is within the power of Congress to prescribe their jurisdiction. This power has heretofore been exercised on numerous occasions, and has often been recognized by the Supreme Court.

Proceeding upon this theory, this bill defines and limits and jurisdiction of the *Federal courts* in the issuance of injunctions in cases involving and growing out of labor disputes. . . . (75 Cong. Rec. pp. 4625-6) .

Sen. Norris:

. . . I want to ask the Senator whether the minority contend that Congress does not have the right to take away from any Federal court, *except the Supreme Court of the United States*, any jurisdiction that the court may have? Would we not have the right to take it all away and abolish the court by statute? (75 Cong. Rec. p. 4682) .

Rep. McKeown:

The great question has always been raised by constitutional lawyers who say that the Congress has no right to interfere with the Federal courts, because the right to issue an injunction is an inherent right granted by the Constitution of this country. Why, no such thing is the case. *There is only one constitutional court, and that is the Supreme Court of the United States. Every other court in this country is created by Congress and lives by reason of Congress*, and the jurisdiction of the Federal courts can be fixed and must be fixed by Congress. (75 Cong. Rec. p. 5486) .

Rep. Garber:

Has Congress the power to legislate the limitations and procedure provided for in this bill? Section 1 of Article III of the Constitution provides—

The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

This delegation of power to Congress carries with it the *power to define the jurisdiction of the inferior courts it creates*, to enlarge or limit that jurisdiction within constitutional limitations. This view is clearly expressed in the case of *Kline v. Burke Construction Co.* in Two hundred and sixtieth United States Reports at Page 234, as follows:

Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the General Government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.

Surely the power that can create or abolish the courts can, within constitutional limitations, fix the jurisdiction of the courts. The restrictions, therefore, upon the administration of injunctive relief by the Federal courts are clearly within the power of Congress. (75 Cong. Rec. 5493).

Senate Report No. 163 of the Senate Judiciary Committee on the bill, at pages 10-11 of the report, states:

No one will seriously doubt the right of Congress, under the Constitution, to limit the jurisdiction of Federal courts. The jurisdiction, for instance, of the district courts of the United States is given by act of Congress. All the courts of the United States *except the Supreme Court* could be entirely abolished by act of Congress, and *while Congress could not give to these inferior courts jurisdiction greater than is provided by the Constitution, it could*, on the other hand, within the limits of the Constitution, *give to the inferior courts such jurisdiction as Congress in its wisdom deems just. It follows, also, that having given this jurisdiction, it*

can, by act of Congress, take away all or any part of it. This has been clearly held by the Supreme Court of the United States in *Myers v. United States* (272 U. S. 52). At page 130 the Supreme Court said:

“ . . . It is clear that the mere establishment of a Federal inferior court does not vest that court with all the judicial power of the United States as conferred in the second section of Article III but only that conferred by Congress specifically on the particular court. . . . ”

In an earlier case the Supreme Court held:

The judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. (Cary v. Curtis, 3 How. 235 (U. S.) at 244).

In a fairly recent case, the Supreme Court, construing the power of the *inferior Federal courts* to exercise jurisdiction over controversies between citizens of different States, pointed out that:

The right of a litigant to maintain an action in a Federal court (on this ground) is not one derived from the Constitution of the United States, unless in a very indirect sense.

. . . A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, can not well be described as a constitutional right. (*Kline v. Burke Construction Co.*, 260 U. S. 226, 233).

A similar view is given in the House Judiciary Committee report (H. Rept. No. 669, pp. 3-5) which states, among other things:

The Constitution of the United States in Article III, section 1, provides:

The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

The provisions of the bill are expressly limited (sec. 13(d)) to courts whose jurisdiction has been or may be conferred by the Congress, under the foregoing provision of the Constitution. The Congress having the power to establish, and confer jurisdiction upon, the courts in question, it can not be questioned that it has the power to restrict or curtail the exercise of their powers, as proposed in this bill. The Supreme Court of the United States has clearly recognized that this is the law in *Kline v. Burke Construction Co.* (260 U. S. 226, 234), (1922), wherein the court says that—

Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the General Government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion provided it be not extended beyond the boundaries fixed by the Constitution (Italics supplied).

Then follows a discussion of authorities bearing upon the power of Congress to restrict the jurisdiction of the constitutional inferior federal courts, which discussion, among other things quotes section 385 of Title 28 U.S.C.A. (the judicial code), a section that clearly does not apply to Territorial courts such as ours, as distinguished from a U. S. District Court in a Territory, and other federal statutes which also clearly are not applicable to our territorial circuit courts. Also the report mentions section 21 of the Clayton Act, which provides:

Sec. 21. That any person who shall wilfully disobey any lawful writ . . . or command of any district court of the United States or any court of the District of Columbia . . . shall be proceeded against for his said contempt as hereinafter provided.

The report then goes on to mention secs. 22-24 of the Clayton Act providing for jury trial in certain criminal contempt cases, and cites *Michaelson v. U. S.*, 266 U. S. 42, 69 L. ed. 162, which sustained the constitutionality of this restriction on the powers of Federal constitutional inferior courts.

The report further states, at page 11, in discussing the definitions of section 13:

The definitions also, as above stated, limit the act to courts of the United States whose jurisdiction has been conferred or limited by act of Congress; that is to say, the *inferior federal courts*.

See also, remarks of Sen. Walsh, 75 Cong. Rec. p. 4692, to the same effect as Rep. Garber's, ante, pp. lii-liii.

APPENDIX D-6

(See Brief, p. 59)

Rep. Sweeney's remarks and other references to congressional debates indicating Congress had only Federal courts in mind in enacting NLGA.

MR. SWEENEY: . . . This measure is intended to curb the abusive power registered by *certain Federal judges* in the promiscuous issuing of injunctions arising out of labor disputes. *It has application only to the inferior Federal courts of the Nation, and limits the jurisdiction and power of those inferior Federal courts.* . . . (75 Cong. Rec. 5502) (Emphasis added.)

To the same effect are statements on the following pages of volume 75 of the Congressional Record, of Senators Nor-

ris (pp. 4502, 4506, 4509, 4510, 4682, 4928); Blaine (pp. 4619, 4620, 4625, 4629, 4630); Hebert, minority leader (p. 4681); Wagner (p. 4915); Shipstead (p. 4932); Wheeler (p. 4935); Steiwer (p. 4938); Robinson (p. 5000-5001); Logan (p. 5005); and Neely (p. 5014); also, of Representatives O'Connor (pp. 5462, 5463, 5464); Michener, minority leader (whose remarks on another question were given great weight in the *Lewis* case, ante (p. 5464 of Cong. Rec.); Bankhead (p. 5465); Dyer (p. 5465); Greenwood (p. 5466-5467); Oliver (p. 5481); Sparks (p. 5487); Celler (pp. 5490, 5505); Condon (p. 5491); Swing (pp. 5491, 5492); Garber (p. 5493); Summers (p. 5500); Glover (p. 5501); and Fernandez (p. 5513). See, also, references to the views of Prof. Frankfurter, this brief, pp. 46, 58, 92, and Appendix D-8, pp. lviii-lxix.

APPENDIX D-7

(See Brief, p. 60)

Remarks of Sen. Norris and Rep. Black re Federal judges with life tenure.

MR. NORRIS: . . . Is it any wonder that there has grown up a feeling of resentment against some of the actions of *some Federal judges*? Is it any wonder that there has gradually grown up in the minds of ordinary people a feeling of prejudice against *Federal courts*? Is it surprising that there should develop a sentiment against *life tenure for Federal trial judges*? Can anyone doubt that such action on the part of the *Federal judiciary* has gradually developed in the minds of ordinary people a fear that where a system of jurisprudence prevails which enables one man, *endowed with a life tenure* of office, to write a law and then order its enforcement . . . (75 Cong. Rec. 4507); (see also, pp. 4509, 4510, 4930, 4938, for other references by Sen. Norris to life tenure of Federal judges as rendering them peculiarly fit subjects for the restrictions of the act).

MR. BLACK: . . . but here we have courts, *judges, appointed for life*—we do not know at whose request, we do not know with whose indorsement, nor why they were appointed—and we give them power to adjudge a man in advance of his acts. (75 Cong. Rec. 5495).

APPENDIX D-8

(See Brief, p. 92)

Excerpts from or references to Prof. Frankfurter's writings and committee reports and debates on, and history of, NLGA indicating its procedural nature.

Mr. Justice Frankfurter, who wrote the opinion in the *Hutcheson* case ante 36, and the memorandum of authorities in House Report No. 669 on the NLGA (see p. 12 of Report) below referred to, was one of the prime proponents of the various bills to restrict the powers of inferior Federal courts in labor injunctions. Besides collaborating in writing *The Labor Injunction* (Frankfurter & Greene, 1930) referred to in House Report No. 669, infra p. lxix, he was also co-author of a number of articles, among them: *Congressional Power over the Labor Injunction* (Mar. 1931) 31 Columbia L. Rev. 385, quoting verbatim at p. 413 S. 2497 in the 71st Congress, which is almost verbatim the NLGA; *The Use of the Injunction in American Labor Controversies* (Jan. 1929); L. Q. Rev. Vol. 45, p. 19; *Legislation Affecting Labor Injunctions* (May, 1929) 38 Yale L. J. 879; *Labor Injunctions and Federal Legislation* (April, 1929) 42 Harv. L. Rev. 766; the last two articles being pre-vues of the book which came out later entitled *The Labor Injunction, supra*. Each of these, without exception, points to the *Federal courts* as the worst offenders in such matters, and urges legislation to restrict the jurisdiction of and regulate the procedure in the *Federal courts*. These writings point out the futility of the substantive law approach.

In the book, *The Labor Injunction*, supra, at pp. 150-151, the authors point out (emphasis added) :

Legislative revision of judicial doctrines of *substantive law* has, on the whole, *proved futile*. The influences that for a generation stimulated legislative easing of the sensitized contacts between law and labor therefore began to promote more concrete measures of relief. They sought to meet specific complaints in the equity process. The measures that were proposed from time to time and frequently enacted had two main objectives: *to narrow the scope of equitable jurisdiction in labor controversies*, and *to correct procedural evils* both in the manner of granting the injunction and in the mode of its enforcement.

Later, under the general heading of "LEGISLATION AFFECTING EQUITY PROCEDURE" (p. 182), the authors discuss the Clayton Act and its failure to accomplish what is stated to have been the real intent of Congress.

Under the heading "PROPOSED FEDERAL LEGISLATION" (p. 204), the authors then discuss the pending Shipstead Bill, the ancestor of the present NLGA, which is quoted in the appendix to the book (pp. 279-288). They point out that

The eagerness of employers to seek injunctions in the *federal courts* and the diverse channels through which the *federal courts* enter these controversies, have given the federal labor injunction its political significance. . . . (p. 205) .

In discussing possible remedies by legislation, the authors say:

A third method is to deal explicitly with labor disputes by *defining and limiting the exercise of federal jurisdiction* in such controversies. This mode of approach merely recognizes that industrial relations present distinctive problems for the wise use of judicial power. *Upon this basis the Senate Committee fashioned its recommendations*. (p. 210) .

Reading this chapter will reveal that the reasoning of the committee reports on what became the NLGA is derived almost verbatim in parts, and certainly in substance, from the ideas expressed in this book.

At page 226, the authors say:

The bill is not a comprehensive code of labor law for the *federal courts*, nor even an all-inclusive formulation of procedural safeguards to remedy revealed defects. The measure under discussion merely deals with the most insistent issues presented by the *labor injunction as utilized by the federal courts* . . .

In this connection, in the article entitled "*Congressional Power over the Labor Injunction*" *supra*, defending the then proposed Norris-LaGuardia Act or one of its direct forbears, the authors say, of the bill:

. . . "*Yellow dog contracts*" are not invalidated; they are only rendered unenforceable in the federal courts. The exact words are: "shall not be enforceable and shall not afford any basis for the granting of legal or equitable relief by any court of the United States. . . ." *Whatever relief may be available in the state courts is open; merely the federal courts must decline to enforce these agreements.* Such a restriction of the ambit of the jurisdiction of the inferior courts denies to no litigant a constitutional right: . . . (p. 401).

But the *dominant intent of this provision, as of the whole bill, is only to restrict federal jurisdiction.* Federal courts are not to be used as instruments for effectuating such agreements. Therefore, an effort by a defendant to remove a case resting upon such a contract from state to federal court will be without avail. If the federal court has been denied jurisdiction over a cause of that character, no removal is permitted, because there is no court to which to remove. . . . (p. 402).

2. *Is the denial of all adequate judicial remedies in case of an illegal strike a denial of due process of law?* This question is not pertinent, for *the bill only withdraws the remedy of injunction. Civil action for dam-*

ages and criminal prosecution remain available instruments. Illegal strikes are not made legal. The question misrepresents the significance of the *Truax* case. . . .

(then follows an explanation of the *Truax* case (257 U. S. 328) showing that it was based on a state statute which purported to *make the conduct lawful* in every respect, which was the basis for the holding that it deprived the owner of the business and premises of his property without due process) (pp. 408-9) .

3. *Is what in effect amounts to legalization of strikes that are now illegal under the state law of infringement upon the legislative power preserved to the states?* This again poses what is not in issue. The bill is *not in effect* a “*legalization of strikes that are now illegal under state law*”. It is a *regulation of equity practice in federal courts*, a practice indisputably within the province of Congress to regulate. *State law is untouched and remains what it is.* If the federal courts will thereby enforce in diversity cases different law from that which state courts apply, it is what federal courts do today in diversity cases, and that, too, not because of any congressional action, but through the judiciary’s own power of law-making. (p. 409) .

Incidentally, anent the attack in the opening brief (pp. 28-31) upon the lower court’s resort to the title in connection with the construction of the act, it is interesting to note that Mr. Justice Frankfurter, in his partial dissent as to the intent of that act in the *Lewis* case (91 L. ed. 595, 625) said:

. . . The title of the Act gives its scope and purpose, and the terms of the Act justify its title. It is an Act “to define and limit the jurisdiction of courts sitting in equity”. It *does not deal with the rights of parties* but with the *power of the courts*. Again and again the statute says “no court shall have jurisdiction,” or an equivalent phrase. Congress was concerned with the *withdrawal of power from the federal courts* to issue injunctions in a defined class of cases. (Emphasis added.)

These are the ideas concerning the act of the very authority who wrote the memorandum of legal authorities justifying the act included in the House report on the bill, and who was also consulted by the Senate Judiciary Committee (See Sen. Rept. No. 163 *infra*, p. lxxv), and whose views therefore were given peculiar sanction by Congress in passing the act.

Similar views were expressed in the Congressional debates:

Sen. Norris:

. . . We realized when we were framing the bill that we had perhaps a *difficult task to so frame it that it would be constitutional and would still outlaw the "yellow dog" contract*. I concede frankly that the courts have sustained the "yellow-dog" contract as a rule. *Our attempt was to get around those decisions and to get around them within the limits of our constitutional authority*. I have not any doubt at all that we have succeeded in doing it in the bill now before us. (75 Cong. Rec. 4627).

Sen. Blaine:

. . . at this point I want to call attention to the fact that *we do not propose by this bill to make void "yellow-dog" contracts. We do not undertake to make invalid such contracts*. As I view it, the *employer will have all the common-law remedy now existing respecting such contracts as he has with respect to any other contracts, but the employer will not be permitted to enforce the "yellow-dog" contract by injunctive processes*. That is what is proposed to be done by this bill, in my opinion. (75 Cong. Rec. 4628).

Sen. Hebert, chief proponent of the minority:

Mr. President, the only relief that can be provided anywhere in the bill is that. *It deals with the jurisdiction of the United States courts, and in no way affects the State courts or their jurisdiction*. (75 Cong. Rec. 4681).

Sen. Wagner (referring to the yellow-dog contract provision) :

. . . we declare it to be, as it is, inimical to the welfare of the Nation, and in the exercise of our power to prescribe the jurisdiction of the Federal courts we provide that that promise shall not be enforceable directly or indirectly, legally or equitably. . . . (75 Cong. Rec. 4916) .

Referring to authorities cited by the minority upon the question of the constitutional infirmity of legislation that directly attempted to affect substantive rights themselves, Sen. Wagner adds:

By the bill . . . we do none of the acts condemned by the court. We do not limit the untrammelled power of the employer to dismiss whom he please. We do not direct the employer whom he shall hire. We do announce that the Federal courts will no longer help or hinder him in the pursuit of a nonunion policy. . . . There are numerous instances where the law permits the exaction of a promise to go unpunished but refuses to enforce the promise when made. . . .

.

Why, then, have we not the power to say that the Federal courts shall not enforce agreements exacted from a workman not to join with his fellow men. . . . (75 Cong. Rec. 4916-7) .

Sen. Walsh (speaking of the yellow-dog contract section of the act) :

. . . However, . . . even though the court should eventually hold that, notwithstanding the character of these contracts . . . the court should find that they still are protected by the Constitution, we are not without remedy, because, so far as the *Federal* courts are concerned, their jurisdiction is controlled entirely by the acts of Congress. We may limit as we see fit the jurisdiction of the *inferior courts of the United States*. . . . (75 Cong. Rec. 4692) .

MR. HEBERT. . . . There is *no provision here which would vitiate the right to sue in a State court.*

MR. BLAINE. Exactly; so that *the only possible legal relief that is denied under the majority bill is relief which may be sought by a corporation or an individual by reason of diversity of citizenship.* (75 Cong. Rec. 4680).

MR. LONG. The bill, as it is reported by the committee, *simply proposes to withhold from the courts certain jurisdiction. That would not prevent litigants from going into the State courts.* The United States courts of every district—in New Jersey or Louisiana or elsewhere—could be denied any equitable jurisdiction at all, *and litigants would be required to go into the State courts to enforce any rights in equity which they might have.* (75 Cong. Rec. 4682-3).

MR. NORRIS. . . . I said I obtained the statute of Pennsylvania. I do not suppose there is any doubt whatever but that there is a similar statute in every State in the Union. In addition to that, *there are the State courts.* Are we going to give jurisdiction to the Federal court to go into the State? *If one has to have an injunction, let him go to his State court and get it; but he does not need to go to either place.* . . . (75 Cong. Rec. 4932).

MR. LAGUARDIA. . . . Mr. Chairman, if these acts of violence are committed or threatened to be committed, there is *no need of resorting to the Federal court. The State authorities and courts have full control and jurisdiction of such local matters.* People may be arrested immediately; but it is only to do something which otherwise would not be properly done that resort is made to the Federal court. . . . (75 Cong. Rec. 5480).

MR. SUMMERS. . . . this bill comes as a protest and as a natural reaction against the abuse of power on the part of some of our Federal judges exercised in labor disputes. . . . One sitting in the galleries and listening to this debate would be justified in concluding therefrom either that *we have no State courts or that this bill strikes down their equity powers.* . . .

.

You would imagine from some of the remarks we have heard today that *we do not have in this Government any States or any judges or any constabulary, nothing but the Federal Government*. I take these few minutes to direct attention to that. Gentlemen would have you believe that if we were to strike down the equity powers of the Federal courts, there would be no judges left in all America who could exercise the equity powers. . . . (75 Cong. Rec. 5500).

MR. SCHNEIDER. . . . It has been pointed out that there are only 11 States in which the issuance of injunctions in labor disputes is restricted by laws similar to the one we now have under consideration. *In the rest of the States actions brought in the State courts to restrain the legitimate activities of organized labor in time of strike will still be available to the enemies of labor*. And it has also been pointed out that the enactment of this bill will not take away from the Federal Government any rights which it has under existing law to seek and obtain injunctive relief where the same is deemed by Government officials to be necessary for the functioning of the Government.

In other words, *a tremendous field in which the injunction can still be used effectively will remain after the enactment of this bill*. . . . (75 Cong. Rec. 5514).

In this measure it is proposed to deal also with a twin evil, the "yellow-dog" contract, as it has been very appropriately called. I am particularly glad that we are united in *seeking to outlaw—at least to the extent that we can do so, which is in the Federal courts*—this abominable product of autocracy in industry. . . . (75 Cong. Rec. 5515).

In Report No. 163 of the Senate Judiciary Committee on the bill, it was pointed out that from December 12, 1927

to the present the Judiciary Committee, in one form or another, has had under consideration the question of *limiting the jurisdiction of Federal courts in granting injunctions in labor disputes*. (Rept. p. 2).

that *Prof. Frankfurter* and other authorities had been called in to assist in drafting proper legislation (p. 3); that

The limitation of the jurisdiction of *Federal* courts to issue injunctions in labor disputes has been a subject of public discussion for many years. . . . It is fair to say that public sentiment on the subject has reached the conclusion that some such limitation is absolutely necessary. (p. 7) ;

that

The bill, under sec. 4, takes away from all *Federal* courts the power to issue such injunctions. . . .

It prohibits *Federal* courts from issuing injunctions restraining anyone from inducing or advising without threat, fraud, or violence, any of these things, regardless of whether the employee may have signed the so-called "yellow-dog" contract. . . . (p. 17)

that, respecting sec. 6, relating to damages for unlawful acts arising out of labor disputes,

. . . There is no provision made relieving an individual from responsibility for his acts, but provision is made that a person shall not be held responsible for an "unlawful act" except upon "clear proof" of participation or authorization or ratification. Thus a *rule of evidence*, not a *rule of substantive law* is established. (p. 19) .

It is appropriate and necessary to define by legislation the proper rule of evidence to be followed in this matter *in Federal courts*. That is the only object of sec. 6. (p. 21) ;

that, as to sec. 8 of the act,

. . . This doctrine here announced is that persons have no right to seek the aid of *Federal courts* and impose upon them additional burdens who have not sought to do all within their power to avoid the aid of the courts and who are not themselves aggravating or causing the dispute by violation of legal obligations. (p. 22) ;

that, as to sec. 12 of the act, concerning the disqualification of judges in certain cases:

. . . Upon the finding of such a demand another judge shall be designated to hear the contempt proceeding, as provided in section 21 of the Judicial Code. (p. 23)

(it should be noted in this connection, that sec. 21 of the Judicial Code, U.S.C.A. 25, is the section which provides for disqualification of judges of Federal district courts, and provides that in such cases, a new judge shall be designated in the manner provided by other sections of the Judicial Code—28 U.S.C.A. 24 and 27—none of which apply to territorial circuit courts having no Federal jurisdiction); and finally that

Section 13 of the bill defines various terms used in the act. . . .

The *main purpose* of these definitions is to provide for limiting the injunctive powers of the *Federal courts* only in the special type of cases, commonly called labor disputes, in which these powers have been notoriously extended. . . . (p. 25).

Likewise, the House Judiciary Committee in Report No. 669 on the bill, made the following statements (Emphasis added) : that

This bill is the so-called anti-injunction bill. It is the outgrowth of years of agitation in the Congress for *restriction upon the powers of Federal equity courts*. . . . (p. 2) ;

that

. . . Section 1 provides that no *United States* court shall have jurisdiction. . . . (p. 3) ;

that section 3 of the bill, "outlawing" the "yellow-dog" contract, provides that any such promise

. . . is contrary to public policy and shall be *unenforceable in any court of the United States*. . . .

This section *in no wise is concerned with interstate commerce or the application of the Sherman Act and its amendments*, but the Federal courts *obtain jurisdiction* in cases involving such contracts by virtue of *diversity of citizenship*; and injunctions have been issued in the Federal courts on the basis of such contracts of employment. . . . (p. 6-7) ;

(note, that this could not possibly refer to Territorial circuit courts, which never derive their jurisdiction over such contracts from diversity of citizenship) ; that, with respect to sec. 6 of the act:

This provision *does not affect the general law of agency*, and it is necessary, under the circumstances, that the courts should know that Congress expects them not to hold officers or associations liable for the unlawful acts of a member without clear proof of actual participation in, or authorization of, any unlawful acts by the officers or association. (p. 9) .

(here again, the report indicates that substantive rights are not intended to be affected generally, but the act is mainly procedural) ; that, with respect to section 7 of the act,

. . . This section is *largely procedural and restrictive* in character. . . .

As will be noted, this is to prevent courts from issuing injunctions without making a finding of facts . . . or where the public officers fail in their duty. The last provision is considered desirable, because it often happens that complainants rush into a *Federal* court and obtain an injunction the enforcement of which required the court to consider and punish acts which are and ought to be, under our system of government, *cognizable in the local tribunals*. . . . (p. 9) .

(of course, our territorial circuit courts are some of the *very local tribunals* to which the act aims to leave the task of considering and punishing such acts) . Finally, in concluding, the House Report appends a memorandum of the law, saying

Many members of the House who are lawyers have given this subject a great deal of consideration, and have expressed their interest in the question of the *power of Congress over equity jurisdiction of the Federal courts*.

A *very interesting and scholarly memorandum* was prepared on this subject by *Prof. Felix Frankfurter*, of

the Harvard Law School, and *coauthor of a recognized and authoritative work on The Labor Injunction* (Frankfurter & Greene, 1930) , in which members will find not only the *historical background* but an abundance of *judicial precedents and decisions on the subject*.

Then follows the memorandum, which treats exclusively of the Congressional power over *Federal* courts, and *Federal* equity jurisdiction, indicating conclusively again that the *jurisdiction and procedure of Federal courts*, and not territorial courts of local jurisdiction, were the sole subjects of Congressional attention and intent.

